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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY AND MEDICAL ENGINEERING CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation is authorized or required to exercise jurisdiction over suits against nondebtor joint tortfeasors on the ground that these suits are "related to" the bankruptcy case under 28 U.S.C. § 1334(b) based upon the right of the nondebtors to pursue claims for contribution against the debtor corporation.

2. Whether 28 U.S.C. § 157(b)(5) empowers a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation to transfer to itself, from state courts throughout the country, cases pending against alleged joint tortfeasors.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties participated in proceedings in the Sixth Circuit: Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by John O'Quinn; Office of the United States Trustee; California Plaintiffs' Steering Committee, as *amicus curiae*; Official Committee of Unsecured Creditors, as Intervenor.

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No. 96-___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

-v.-

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, CORNING INCORPORATED, BAXTER INTERNATIONAL INCORPORATED, MINNESOTA MINING AND MANUFACTURING COMPANY, BRISTOL-MYERS SQUIBB COMPANY, and MEDICAL ENGINEERING CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, the Official Committee of Tort Claimants (the "Committee") of Dow Corning Corporation ("Dow Corning" or the "Debtor"), petitions for a writ of certiorari to review the amended decision of the United States Court of Appeals for the Sixth Circuit issued on June 3, 1996. The Sixth Circuit reversed the holding of the United States District Court for the Eastern District of Michigan that the

district court lacked subject matter jurisdiction under the Bankruptcy Code over thousands of state law tort claims pending against nondebtor corporate defendants in courts across the country. The Sixth Circuit held that these claims came within the "related to" jurisdiction provided to district courts sitting in bankruptcy principally because, if these nondebtor defendants lost their cases, they might pursue contribution claims against the Debtor that the court held conceivably might have an impact on the Debtor's estate.

OPINIONS BELOW

The district court issued two opinions on September 12, 1995 that were the subject of respondents' appeals to the Sixth Circuit: The first, addressing Dow Corning's motion to transfer claims pending against its corporate parents, Dow Chemical Company ("Dow") and Corning Incorporated ("Corning"), is reprinted at 29a-56a. The second opinion, addressing motions by three unrelated defendants, Baxter International Incorporated ("Baxter"), Minnesota Mining & Manufacturing Company ("3M"), and Bristol-Myers Squibb Company and Medical Engineering Corporation (together "Bristol-Myers"), is reprinted at 57a-64a. The district court's decisions are reported, respectively, at 187 B.R. 919 and 187 B.R. 934. The Sixth Circuit reversed the district court in a decision issued on April 9, 1996. The decision, reported at 81 F.3d 635, was withdrawn in favor of an amended opinion issued on June 3, 1996 and reported at 86 F.3d 482. The amended decision is reprinted at 1a-28a; the court's accompanying order is reprinted at 65a-66a.

JURISDICTION

The decision of the Sixth Circuit reversing the decisions of the district court was issued on April 9, 1996. A timely petition for rehearing was filed on April 22, 1996 and denied on June 3, 1996, when the Sixth Circuit issued its amended opinion. This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Two statutory provisions are principally involved in this case:

28 U.S.C. § 1334(b), which in relevant part grants federal court jurisdiction over claims "related to" a debtor's bankruptcy, reads in full as follows: "Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

28 U.S.C. § 157(b)(5) provides: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

STATEMENT OF THE CASE

Petitioner was appointed in Dow Corning's bankruptcy case to represent the interests of thousands of product liability/tort claimants against the Debtor. The Debtor's principal liability consists of billions of dollars of

claims by women suing for diseases and injuries alleged to have been caused by silicone gel breast implants created and marketed by the Debtor and others. The decision of which review is sought sustains a motion to bring thousands of breast implant claims pending against other, nondebtor corporate defendants within the bankruptcy jurisdiction through a "transfer" of those claims to the District Court for the Eastern District of Michigan. The Sixth Circuit's decision represents an unprecedented expansion of bankruptcy jurisdiction and, if allowed to stand, will have a drastic impact on the American tort law system never contemplated, much less intended, by Congress. The decision also conflicts with decisions in at least one other circuit limiting "related to" jurisdiction to actions that may themselves have an impact upon the property of the debtor or the administration of its estate.

A. Background: The Breast Implant Claims as Asserted by Plaintiffs

As asserted against the Debtor and the nondebtor respondents, the thousands of tort claims affected by the decision below may be summarized as follows:[1]

The first breast implant using silicone manufactured by the Debtor was implanted into a woman in 1962 — at a time when the safety of the implanted materials had not even been tested on any animal. Relying for silicone's safety on inadequate research dating from the 1940s and no testing, the Debtor began actively marketing silicone breast implants in 1964, representing to the world that silicone products were

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[1] The affected claims have not been adjudicated. Hundreds of others have been settled or gone to verdict, involving payments of hundreds of millions of dollars by the Debtor and the nondebtors.

permanent, completely safe, and non-toxic. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.* ("*In re Silicone*"), 887 F. Supp. 1455, 1457-58 (N.D. Ala. 1995) (vacating summary judgment in favor of Dow).

For decades the Debtor and Dow, its parent, continued to represent to the public that silicones were totally inert and stable and thus harmless when implanted into the body, while knowing of and concealing from the public substantial data indicating the contrary. *See id.* at 1457-59; *see also Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1119 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 734 (1995). Research conducted by or under the direction of both the Debtor and Dow, and revealed by their records, demonstrated that silicones let loose in the body migrated via the lymphatic, circulatory, and other systems, and that silicones harmed the livers of test animals, caused skin rashes, and produced other adverse reactions. *See generally In re Silicone*, 887 F. Supp. at 1457-58. In addition, the Debtor failed to disclose evidence that silicones produced dramatic physiological changes in the reproductive and other bodily systems of test animals and that the implants leaked and ruptured at a high rate. *See generally Hopkins*, 33 F.3d at 1119 (affirming jury award of over $7.3 million in compensatory and punitive damages based on evidence that the Debtor "rushed development of the silicone gel implants, failed to adequately test the implants, and ignored knowledge of adverse health consequences associated with the implants").

In March 1994, the Debtor and other defendants entered into a global settlement of breast implant claims against them under which the defendants would have contributed up to $4.25 billion to compensate implant recipients. In September 1994, Judge Sam C. Pointer, Jr., who presides over thousands of federal suits referred to him

by the Judicial Panel on Multidistrict Litigation ("the MDL proceedings"), approved that settlement. *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, Civ. A. Nos. CV92-P-10000-S, CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

But the settlement amount proved to be insufficient. More than 14,000 class members elected to opt out of the settlement and to pursue their own suits against the Debtor, while nearly a half million women registered to participate in the settlement — far too many to be compensated fully at the scheduled amounts. On October 7, 1995, Judge Pointer tentatively approved a new offer by certain defendants (not including the Debtor, which had withdrawn from the settlement effort and then filed for Chapter 11 protection) to increase their contributions to a restructured settlement to which plaintiffs' counsel have not agreed. *See In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL 926, CV 92-P-10000-S (N.D. Ala. Oct. 7, 1995) (Order No. 26).

B. The Commencement of the Bankruptcy and the Proceedings Below

The Debtor commenced this bankruptcy on May 15, 1995. Though the Debtor at all times affirmed that it was solvent and could meet its liabilities, the volume of pending tort suits against it was stated to be the motivating reason for the bankruptcy filing. Upon filing for Chapter 11 protection, the Debtor had an automatic stay of all the actions under Bankruptcy Code § 362(a). In addition, the Debtor immediately commenced an adversary proceeding seeking a temporary restraining order (denied on May 26, 1995) and then a preliminary injunction under § 105 of the Bankruptcy Code barring opt-out plaintiffs from proceeding to trial against its shareholders Dow and Corning (denied by dismissal of the adversary proceeding on June 8, 1996).

The Debtor then tried again to obtain bankruptcy shelter for its shareholders by moving on June 12, 1995 to transfer to the district court not only the already stayed cases against itself but also those proceeding toward trial against Dow and Corning. The other nondebtor breast implant defendants, also large, highly profitable corporations, moved two days later for transfer of cases pending against them.

The Committee and counsel for many individual plaintiffs opposed all of the transfer motions. Plaintiffs argued the futility of trying to resolve myriad complex questions of "disease causation" in a single trial before a single judge (the claimed purpose of the transfer motions)[2] and the unfairness that would result from global treatment of questions of injury causation as to which each claimant has a personal right to a jury trial under 28 U.S.C. § 1411. In its order dated September 12, 1995 on the Debtor's motion, the district court held that it had jurisdiction only over claims against the Debtor, and granted the Debtor's motion to transfer with respect to such claims. However, the court rejected the Debtor's suggestion that an immediate joint causation trial would be useful, directing instead that the federal opt-out cases against the Debtor *not* be physically transferred and that they remain for pre-trial purposes in the MDL Proceedings before Judge Pointer in Alabama. *See* 45a-48a.

The district court rejected the Debtor's attempt to transfer the claims pending against its parents, holding that such claims are not "related to" the Debtor's bankruptcy and

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2 This futility is compounded by the fact that a substantial portion of the tort claims against the Debtor and the other defendants are based in whole or part not on disease but on physical injury, pain, and permanent disfigurement caused by the need to "explant" ruptured or leaking implants.

thus not within the jurisdiction conferred by 28 U.S.C. § 1334(b). Because of the remote connection to the Debtor's estate, the court held that there was no federal court jurisdiction over claims against the parents under either § 1334(b) or 28 U.S.C. § 1367 (supplemental jurisdiction). The court added that claims against the nondebtors should be remanded to the state courts if the only basis for removal was alleged "related to" or supplemental jurisdiction. 54a. The motions of the other nondebtors were disposed of in similar fashion in a separate order issued the same day.

The Debtor, its parents, and the three unrelated defendants all took appeals from the September 12 orders of the district court. The court of appeals reversed the central holding of the district court that claims against nondebtor defendants did not come within the "related to" jurisdiction of 28 U.S.C. § 1334(b). The circuit court held that such jurisdiction existed with respect to claims against all of the defendants because of the possibility that such parties might pursue claims for contribution in the Debtor's bankruptcy. *See* 13a-21a.[3]

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[3] The Sixth Circuit adverted to a second ground for "related to" jurisdiction, but only with respect to claims against Dow and Corning, the Debtor's corporate parents: the potential impact of nondebtor claims on insurance jointly held by the Debtor and its parents. *See* 21a-23a. Since this ground could not be asserted as a basis for "related to" jurisdiction over claims against the non-shareholder nondebtors, a reversal of the Sixth Circuit's judgment as to those parties would follow automatically from a determination by this Court that the prospect of contribution claims does not itself establish such jurisdiction. With respect to claims against the Debtor's corporate parents, we believe the appropriate disposition would then be reversal with a remand to determine whether the addition of the insurance factor is sufficient to establish "related to" jurisdiction over the Dow and Corning claims.

The Sixth Circuit also rejected the petitioner's argument that 28 U.S.C. § 157(b)(5), the statute under which respondents sought a "transfer" of the nondebtor claims, does not speak of or provide for any such transfer. *See* 23a-26a.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision would effect an enormous destructive change in the American tort system. Under the rule of this decision, in any mass tort litigation involving even theoretical contribution claims among independent corporate tortfeasors, the bankruptcy of one defendant could lead to the shutting down of litigation against *all* defendants through the device of a "transfer" of such claims to a single bankruptcy forum. Instead of proceeding toward trial or settlement in appropriate venues, such cases would be effectively frozen pending resolution of the co-defendant's bankruptcy. The harm to the plaintiffs is particularly severe since the bankruptcy court has no authority to impose or implement a resolution of litigation against nondebtor defendants short of trying each claim against them. The effect of the transfer is merely indefinite delay.

It is petitioner's submission that this decision distorts the relevant provisions of the bankruptcy law and violates basic principles allocating tort jurisdiction in our federal system. But whether it is correct or not, the Sixth Circuit's ruling has the kind of massive impact and doctrinal significance that warrants the authoritative attention of this Court on certiorari. The Sixth Circuit's decision also creates a direct conflict with the Third Circuit's decision in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and diverges from the balanced approach taken by other circuits (including, most recently, the Seventh Circuit in *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996)), adhering to the

core principle of *Pacor* that only cases that might themselves affect the estate may be deemed "related to" a debtor's bankruptcy. Finally, whether or not the nondebtor claims are within the outer reaches of the "related to" jurisdiction, § 157(b)(5) was never intended to effect a mass transfer of claims against nondebtors of the type approved by the Sixth Circuit.

1. The decision of the Sixth Circuit would accomplish a wholesale enlargement of the bankruptcy jurisdiction at the expense of state judicial authority and the interests of state litigants in the timely and efficient adjudication of state law claims. This striking redistribution of litigation authority and judicial business is an effect that Congress showed no intention of seeking in the pertinent provisions of the Bankruptcy Code. The decision of which review is sought thus has prospective impact not only on large volumes of cases but on the fundamental division of judicial authority under familiar principles of the federal system.

According to the decision below, a claim is "related to" a debtor's bankruptcy if there is any possibility that the defendant, upon being held liable, may assert a contribution claim against the debtor. The circuit court imposed no requirement that the contribution claim already have been asserted, even on a contingent basis in a pleading. It required no showing that ultimate assertion of the contribution claim is likely: "The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably *could* ripen into fixed claims. The *potential* for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy." (20a, emphasis added.)

The massive significance of the Sixth Circuit's expansion of "related to" jurisdiction is patent from the circumstances of the instant case alone as well as the readily discernible broader implications of what has been decreed. Anticipating the position adopted by the court of appeals, the respondents accomplished wholesale removals to federal courts across the country of many of the tort cases they had been defending in state courts. The removals purported, of course, to invoke "related to" jurisdiction. The predictable result was a wholesale shutting down of the state litigations, many of which had been verging on trial. The next step in this scenario, the "transfer" to the Eastern District of Michigan, was a recipe for total paralysis. It had to be obvious to everyone, not least the plaintiffs facing their long-postponed day in court, that the District Court for the Eastern District of Michigan could not possibly try more than a minute fraction, if any, of these thousands of cases the plaintiffs had sought to present to juries in their several states. The result was a defendant's dream and a plaintiff's nightmare on a nationwide scale — long, indefinite postponements for impecunious plaintiffs and comfortable defendants, the ideal posture for negotiation of cheap settlements.

It happens that in this case, following the reversal and remand, the district court concluded it should abstain, mandatorily and in the exercise of its discretion, under 28 U.S.C. § 1334(c). Although the abstention ruling appears to be unappealable, 28 U.S.C. § 1334(d), respondents have nevertheless filed notices of appeal, and the general significance of what the Sixth Circuit has held remains unimpaired in any event. Though respondents have thus far failed in their opposition to abstention in this particular case, the sweeping dimensions of "related to" jurisdiction as defined by the Sixth Circuit may be counted on to serve the visible purpose of both blocking state litigation and

transferring it from the courts in which plaintiffs have exercised their right to proceed.

At a minimum, the logic of the decision of the court of appeals portends the clear and disturbing consequences outlined above. Altering the settled understanding that the bankruptcy of one joint tortfeasor neither absolves the others nor delays proceedings against them, it is now held by the Sixth Circuit that any of such other defendants, all of whom have potential claims for contribution, may employ that prospect or possibility as a means of transferring the cases against them and putting them in the deep freeze of a single court overseeing a bankruptcy, commonly at a far remove from the venues the plaintiffs chose. These unsettling consequences in the growing area of mass tort cases have obvious analogues in other areas of the law. Even for tort claims, the impact is by no means confined to "mass" situations. Any alleged joint tortfeasor of a defendant in Chapter 11 would have, according to the Sixth Circuit, an easy route to long delay in an often distant bankruptcy court. The implications of all this are matters of importance warranting this Court's scrutiny.

2. The decision below conflicts with that of the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), and diverges significantly from *In re Fedpak Systems, Inc.*, 80 F.3d 207 (7th Cir. 1996), in its expansive approach to what "related to" means.

Pacor embodies a thoughtful and balanced approach to bankruptcy jurisdiction that justifies the decision's wide influence. Pacor, a defendant in a suit arising from an asbestos-related injury, impleaded Johns-Manville, the alleged manufacturer of the asbestos. After Johns-Manville entered bankruptcy, Pacor removed the underlying case to federal bankruptcy court alleging that there was "related to"

jurisdiction because a finding of liability in the underlying suit could support a subsequent indemnity claim by Pacor against the debtor. 743 F.2d at 994. The Third Circuit rejected this argument, holding that even though a judgment in favor of the nondebtor defendant would eliminate the possibility of any claim by Pacor against Johns-Manville, the mere fact that a judgment in the other direction *might* give rise to a subsequent, separate indemnity claim did not satisfy the "related to" requirement. *Id.* at 995. The court contrasted situations in which a judgment against a nondebtor would directly affect the estate because of a pre-existing indemnification agreement or other basis for automatic liability for the estate. *Id.*

Pacor reached this result applying a test that includes, but is not fully expressed in, the language seized upon by the Sixth Circuit and other courts in reading "related to" jurisdiction most expansively: whether a proceeding "could conceivably have any effect on the estate." *Id.* at 994. *Pacor* qualifies that seemingly limitless standard with further language frequently ignored by other courts, including the Sixth Circuit here.

Under *Pacor*, an action is "related to" the debtor's bankruptcy only "if the *outcome* could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively)" or if it would "impact[ ] upon the handling and administration of the bankrupt estate." *Id.* (emphasis added). *Pacor* stressed that "jurisdiction of the bankruptcy courts to hear cases related to bankruptcy is not without limit." *Id.* at 994. "[T]here must be some nexus between the 'related' civil proceeding and the title 11 case" beyond "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate." *Id.* The Third Circuit has reaffirmed the *Pacor* approach as recently as this year. *See Torkelsen*

v. Maggio (In re Guild and Gallery Plus), 72 F.3d 1171, 1180-82 (3d Cir. 1996).

Read in its entirety, *Pacor* makes clear that "conceivably" does not mean "anything lawyers can conceive of". By necessity the standard requires some reasonable limitation — a real possibility that the purportedly "related to" action will *itself* materially impact the estate, not that it *might* start a hypothetical multi-step chain reaction that *might* ultimately, indirectly, have such an effect. This implicit limitation is why "a large majority of cases reject the notion that bankruptcy courts have 'related to' jurisdiction over third-party actions." *Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 753 (5th Cir. 1995).

This Court recognized in *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), that the question of how to mark the boundaries of "related to" jurisdiction was fostering division in the circuits. The Court cited with approval the Third Circuit's attempt in *Pacor* "to strike an appropriate balance" between Congress's intention to grant broad jurisdiction and the inherently limited nature of the authority vested in bankruptcy courts. *Id.* at 1499 & n.6. The Court expressly agreed with *Pacor* that "a bankruptcy court's 'related to' jurisdiction cannot be limitless." *Id.* at 1498.

While the *Celotex* decision did not expressly adopt the *Pacor* standard, its conclusion that "related to" jurisdiction existed in that case is fully consistent with the *Pacor* approach. *Celotex* concerned a direct and immediate effect on the bankruptcy estate: an attempt by a creditor to execute on a surety bond securing a judgment against the debtor. Execution would immediately have had a "direct and substantial adverse effect" on the debtor because it would have entitled the surety to go after collateral posted by the debtor to secure the bond. *See* 115 S. Ct. at 1500. In the

courts below, respondents in this case focused on language of the bankruptcy court in *Celotex* quoted by this Court indicating that the *degree* of harm to the estate that could be occasioned by the action on the bond was uncertain. *See id.* But it was beyond dispute that *some* impact on the estate would flow from execution on the fully secured bond. And the Court expressly contrasted, as not coming within the "related to" jurisdiction, cases that themselves "have no effect on the debtor." *Id.* at 1499.

Consistent with *Pacor* and *Celotex*, the Seventh Circuit recently expressed a balanced and appropriately limited view of "related to" jurisdiction that diverges from the Sixth Circuit's decision in this case. *In re Fedpak Systems, Inc.*, 80 F.3d 207, 213 (7th Cir. 1996), expressed a "more limited" vision of "related to" jurisdiction, focusing on cases affecting the property of the debtor or otherwise directly affecting the debtor's estate: "We have interpreted 'related to' jurisdiction narrowly 'out of respect for Article III' . . . as well as to prevent the expansion of federal jurisdiction over disputes that are best resolved by the state courts. . . . Additionally, we believe that common sense cautions against an open-ended interpretation of the 'related to' statutory language 'in a universe where everything is related to everything else.'" *Id.* at 214 (citations omitted). In *Fedpak*, the court found no "related to" jurisdiction over a proceeding initiated by the *debtor* to clarify the intellectual property rights of a third party and thus "protect the flow of royalty payments from [that party] to the bankruptcy estate." *Id.* The court noted an absence of evidence that the third party "is so troubled by the ambiguity of the current situation that it will cease making payments to the bankruptcy estate," and thus held that no jurisdiction existed over a proceeding raising potential impacts on the estate that were "at best speculative and hypothetical." *Id.*

Pacor, *Celotex*, and *Fedpak* are all consistent with another line of cases holding that the automatic stay provided under § 362(a) of the Bankruptcy Code applies only to claims against the debtor and is not to be extended, absent extraordinary circumstances, to protect solvent nondebtors from ordinary litigation risks. *See, e.g.*, *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991) (bankruptcy filing "does not bar an action against the principal of a debtor-corporation"); *Teachers Ins. & Annuity Ass'n v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986) ("Chapter 11, unlike Chapter 13, contains no provision to protect non-debtors who are jointly liable on a debt with the debtor"); *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1330 (10th Cir. 1984); *In re Crazy Eddie Sec. Litig.*, 104 B.R. 582, 584 (E.D.N.Y. 1989); *see also In re Kelton Motors, Inc.*, 121 B.R. 166, 192-93 (Bankr. D. Vt. 1990) ("[T]he filing of a bankruptcy petition . . . does not, as a general rule, stop litigation against non-debtors although they are in some way connected with the bankrupt, such as joint tortfeasors . . . and related companies") (collecting cases).

The narrow exception to this rule recognized by some courts is also consistent with the balanced approach of *Pacor*. The automatic stay may be extended, these cases provide, to claims against parties, such as corporate officers and directors, whose interests are so intertwined with those of debtors through common defense obligations and automatic indemnification that suits against them are, effectively, suits against the debtors. *See, e.g., In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 861 (6th Cir. 1992); *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1001-02, 1007 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986). At least one court has declined to adopt this exception. *See O'Malley Lumber Co. v. Lockard (In re Lockard)*, 884 F.2d 1171, 1179 (9th Cir. 1989).

Breaking away from the relatively harmonious principles of the cases treated in the foregoing three or four paragraphs, some courts have recognized virtually limitless "related to" jurisdiction, seizing on the "conceivable" language in *Pacor* and ignoring its holding and its more nuanced formulation of the appropriate test. For example, *Wood v. Wood (In re Wood)*, 825 F.2d 90, 94 (5th Cir. 1987), held that "related to" jurisdiction attaches automatically to all claims involving "joint conduct of the debtor and non-debtor defendants." This approach has garnered cogent scholarly criticism:

> Several courts have erroneously liberalized the Pacor standard by seizing on the "conceivably have any effect" language without referring to the sentence which follows and limits it. For example, one court has declared that "all that is required for the subject matter jurisdictional nexus is that the activity have some conceivable impact on the bankruptcy reorganization or estate." Such reformulations of the Pacor test are taken out of context and ignore Pacor's subsequent language and analysis explaining, modifying and limiting the otherwise extremely broad implication that any conceivable impact upon the bankruptcy case gives rise to related jurisdiction.

Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 Bus. Law. 913, 926-27 (May 1992) (footnotes omitted). *See also* E. Scott Fruehwald, *The Related to Subject Matter Jurisdiction of Bankruptcy Courts*, 44 Drake L. Rev. 1, 30-32 (1995) (similarly

arguing that some courts have read "related to" jurisdiction too broadly).

To understand the extraordinary reach of the Sixth Circuit's holding, it is useful to understand the farfetched nature of the hypothetical contribution claims on which the court principally predicated jurisdiction. No such claim has ever been pursued against the Debtor, although the breast implant litigation has been pending for years and dozens of cases have gone to trial. There is no evidence in the record that any of the non-shareholder nondebtors has ever even *pleaded* such a claim against the Debtor, even in the MDL proceedings, where master pleadings were filed by each party.

To pursue a contribution claim, a nondebtor defendant would have to plead and prove a fact that would destroy its position in the outstanding litigation: that breast implants cause disease and other injuries. *See Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77, 82 (1981) (proof of joint liability is necessary element of common law contribution claim). *See also* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 50, at 339-40 (5th ed. 1984); Restatement (Second) of Torts § 886A, comment g (1979). The suggestion that any nondebtor defendant would come into the Eastern District of Michigan and attempt to prove that Dow Corning's breast implants or silicone gel caused injury to thousands of women is a flight of advocates' fancy. Dow, the Debtor's parent with the more significant exposure, has pledged not to do so. The Debtor knows that the non-shareholder nondebtors are similarly barred by practicality from pursuing contribution claims, and it has therefore shown no concern about cases proceeding to trial against these parties. The Debtor's failure to endorse the transfer motion made by the non-shareholder nondebtors —

and indeed its failure to assert contribution claims on its own behalf against any other breast implant defendant — highlights the unreality of the assertion that contribution claims will have an impact on the estate.

3. An independent ground for granting the petition is the Sixth Circuit's holding that 28 U.S.C. § 157(b)(5) empowers the district court to order transfer of any "related to" case from anywhere in the country to the district court in the bankruptcy venue. The Sixth Circuit's holding constitutes a plain misreading of the statute that, combined with its expansive reading of "related to" jurisdiction, threatens to undermine the balance struck by Congress in setting forth the powers of courts sitting in bankruptcy.

The starting point for analysis is, of course, the language of § 157(b)(5):

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The most striking thing about that provision for present purposes is that the word "transfer" is nowhere to be found in it. The meaning of that plain omission for the non-debtors is that they have no basis in law for the transfers they sought.

Section 157(b)(5) is a venue-setting provision for personal injury tort cases *against the debtor*. This becomes clear from the setting of this provision within

§ 157 as a whole, which deals generally with the division of responsibility between the district and bankruptcy courts. Literally, of course, when § 157(b)(5) refers to "personal injury tort and wrongful death claims" without qualification, it could mean such claims against anyone, anywhere. But it obviously does not mean that. It means non-core proceedings triable by the district court, not the bankruptcy court. *See In re United States Lines, Inc.*, 128 B.R. 339, 341 (S.D.N.Y. 1991). What kind of non-core proceedings? Section 157(b)(2)(B) answers this question: "personal injury tort or wrongful death claims *against the estate*" (emphasis added).

The looser conception of § 157(b)(5) has crept into some cases because "transfer" is a perfectly sensible word to apply to the power over cases in which *the debtor* is a defendant. Such cases are automatically *in* the bankruptcy court in the fundamental sense that they are held in place by that court by virtue of the automatic stay imposed by Bankruptcy Code § 362(a). For those cases, the bankruptcy district court is empowered to say whether they may be tried at all so long as the bankruptcy is pending. It is a rational corollary to grant the power to say *where* they may be tried. In that orderly scheme of things, it is suitable to speak of the venue-setting power of the district court as a power of "transfer." But the notion of a wider power over cases between nondebtors is embraced neither by the statutory language nor by the essential scheme of the relevant Code provisions.

As against the sound understanding that § 157(b)(5) refers to claims against a bankrupt estate, the extraordinary power to transfer nondebtor cases from courts throughout the country, both state and federal, is a kind of sweeping authority that would require the most persuasively explicit statutory language. When Congress meant to provide for

transfer only of cases pending in *federal courts*, and then only for purposes of pretrial handling, it created a special multi-judge tribunal for the purpose. 28 U.S.C. § 1407. There is no persuasive suggestion anywhere that Congress intended to grant the headier power the appellants claim — to pluck cases out of state and federal courts everywhere into the bankruptcy jurisdiction — to any single district judge in bankruptcy cases.[4]

The contrary view pressed by respondents and adopted by the Sixth Circuit has its judicial origin and principal support in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert denied*, 479 U.S. 876 (1986), which turns out upon close inspection to be strange authority indeed, notably because no transfer of claims against nondebtors — or even claims against the debtor — ultimately was ever authorized or made in that case. It is true that Judge Mehrige ordered transfer there of "related to" cases, but his order to that effect was remanded because the affected parties had not received necessary notice of the proposed transfers. *Id.* at 1015-16. On remand, that notice was never given; the transfers never happened; and the *Robins* reorganization went forward to completion unimpeded. *See* Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 66 (1991).

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[4] Indeed, reading this power into § 157(b)(5) threatens to place district courts sitting in bankruptcy on a collision course with judges sitting in MDL proceedings. The MDL system governed by 28 U.S.C. § 1407 serves to streamline and coordinate pretrial proceedings in mass torts and other complex litigations. To allow the bankruptcy of a single defendant in an MDL proceeding to justify wholesale transfer of claims pending against nondebtor codefendants in that proceeding would not only be unprecedented -- it would undermine and disrupt a system that has functioned well for 25 years.

Moreover, the Fourth Circuit's discussion of the transfer issue in *Robins* proceeds entirely upon considerations relating to suits *against the debtor* and does not reason at all about the subject of possible "related" cases against nondebtors. The Fourth Circuit's analysis repeatedly refers to "tort cases against a Chapter 11 debtor" (788 F.2d at 1010); transfer of venue "of a case against the bankrupt to another district" (*id.* at 1011); "personal injury tort claims against a debtor" (*id.*); and so on for several pages. Codefendants are mentioned only in one passing reference (*id.* at 1016), strongly suggesting that the court simply never focused on the question whether § 157(b)(5) was intended to permit transfer of nondebtor claims.

The Sixth Circuit relied heavily on statements in *Robins* that claims against A.H. Robins could not be estimated or a dispute resolution facility established unless all Dalkon Shield claims were physically consolidated in one forum. *See* 25a-26a. But it is undisputed that (1) no cases were ever actually transferred in the Robins bankruptcy and (2) the lack of such a transfer had not a whit of impact on the district court's ability to estimate the value of the Dalkon Shield claims and resolve the bankruptcy by establishing a claims resolution facility. Thus, to the extent the Fourth Circuit in *Robins* spoke in terms that would stretch the boundaries of § 157(b)(5) to achieve a policy goal, it has since become clear that the attainment of that goal is unrelated to any purported need to transfer cases. Estimation and liquidation of pending tort claims are two different things, and only the former need occur in the centralized bankruptcy forum. Even more clearly, it is wholly unnecessary to have claims against *non*debtors transferred.

In short, the correct reading of 28 U.S.C. § 157(b)(5) is a further question of moment adding measurably to the reasons for granting the writ.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

Nos. 95-2034, 95-2082, 95-2084,
95-2106, and 95-2107.
Argued March 5, 1996.
Decided April 9, 1996.

In re DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, *et al.*: Official Committee
of Tort Claimants, *et al.*,

Plaintiffs-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTH
CARE PROVIDERS OF CONNECTICUT, *et al.*,

Defendants,

Dow Corning Corporation; The Dow Chemical Company (95-2034/2107); Corning Inc. (95-2107); Baxter Healthcare Corporation; Baxter International Inc. (95-2082); Minnesota Mining and Manufacturing Co. (95-2084); Bristol-Myers Squibb Co.; Medical Engineering Corporation (95-2106),

Defendants-Appellants.

Before:

MARTIN and BATCHELDER, *Circuit Judges*
WISEMAN, *District Judge.**

AMENDED OPINION

BOYCE MARTIN, JR., *Circuit Judge.*

This is an appeal to determine the subject matter jurisdiction of federal district courts, sitting as bankruptcy courts, over proceedings "related to" a case filed under Chapter 11 of the Bankruptcy Code, and the ability of federal district courts to transfer such proceedings to the district court in which the bankruptcy case is pending. The principal issue presented is whether the district court erred, as a matter of law, in its determination that claims for compensatory and punitive damages asserted in tens of thousands of actions against numerous nondebtor manufacturers and suppliers of silicone gel breast implants could have no conceivable effect upon, and therefore were not related to, the bankruptcy estate of The Dow Corning Corporation. The district court held that it did not have "related to" jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b) and concluded that they could not be transferred to it pursuant to 28 U.S.C. § 157(b)(5). For the following reasons, we REVERSE and REMAND for further proceedings consistent with this opinion.[1]

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* The Honorable Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

[1] In this amended opinion, we adhere to our April 9, 1996 decision in this case, but seek to clarify the scope of our ruling and the impact we intend it to have. The opinion is therefore amended and reissued as follows,

I.

Until it ceased their manufacture in 1992, Dow Corning was the predominant producer of silicone gel breast implants, accounting for nearly 50% of the entire market. In addition, Dow Corning supplied silicone raw materials to other manufacturers of silicone gel breast implants. In recent years, tens of thousands of implant recipients have sued Dow Corning, claiming to have been injured by autoimmune reactions to the silicone in their implants. Dow Chemical Company, Corning Incorporated, Minnesota Mining and Manufacturing Company, Baxter Healthcare Corporation and Baxter International Incorporated,[2] and Bristol-Myers Squibb Company and Medical Engineering Corporation[3] are other manufacturers and suppliers of silicone gel-filled implants, and are codefendants with Dow Corning in a large number of personal injury actions.

On June 25, 1992, prior to Dow Corning's filing of its Chapter 11 petition, the Federal Judicial Panel on Multidistrict Litigation ordered the consolidation of all breast implant actions pending in federal courts for coordinated pretrial proceedings, and transferred those actions to Chief Judge Pointer of the Northern District of Alabama. On September 1, 1994, Chief Judge Pointer certified a class for settlement purposes only, and approved a complex agreement between members of the class and certain defendants that contemplated the creation of a $4.25 billion fund to cover, among other things, the costs of treatment and other expenses incurred by breast implant recipients. Each class member was given the opportunity to opt out of the class and to pursue her individual claims separately. Several thousand plaintiffs opted out of the

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[2] Baxter never designed, manufactured, or marketed breast implants, but is a defendant in personal injury actions as a result of certain corporate acquisitions and mergers. The Baxter implants were actually made by The Heyer-Schulte Company.

[3] The Bristol-Myers Squibb implants were made by a subsidiary, The Medical Engineering Corporation.

settlement class, while approximately 440,000 elected to register for inclusion in the Global Settlement.[4]

Due to the litigation burden imposed by what is one of the world's largest mass tort litigations, and the threatened consequences of the thousands of product liability claims arising from its manufacture and sale of silicone breast implants and silicone gel, Dow Corning filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 15, 1995, in the United States District Court for the Eastern District of Michigan. The district court had jurisdiction over that proceeding pursuant to 28 U.S.C. § 1334(a). As a result of Dow Corning's Chapter 11 filing, all breast implant claims against it were automatically stayed pursuant to 11 U.S.C. § 362(a). Claims against Dow Corning's two shareholders, Dow Chemical and Corning Incorporated, and the other nondebtor defendants were not stayed. Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb subsequently removed many opt-out claims in which those companies were named defendants with Dow Corning from state to federal court pursuant to 28 U.S.C. § 1452(a).

On June 12, 1995, Dow Corning filed a motion pursuant to 28 U.S.C. § 157(b)(5)[5] to transfer to the Eastern District of Michigan opt-out breast implant claims pending against it and its shareholders, Dow Chemical and Corning Incorporated.[6] Dow Corning's motion covered claims that had been

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[4] It has since become clear that the original Global Settlement will not hold together because the sums provided are inadequate to fund the claims filed by over 100,000 plaintiffs. Unless a modified settlement is reached, thousands of opt-in plaintiffs and thousands of claimants who have yet to file actions are likely to file or reactivate individual suits against the breast implant defendants in both state and federal courts.

[5] Title 28 U.S.C. § 157(b)(5) states: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

[6] Dow Corning's motion sought a transfer of lawsuits against it and its shareholders which were not part of the global settlement. Dow

removed to federal court and were pending in the multidistrict forum, as well as claims pending in state courts which were in the process of being removed to federal courts pursuant to 28 U.S.C. § 1452(a). Dow Corning envisioned its transfer motion as the first step in ensuring a feasible plan of reorganization, and indicated that it would seek to have the transferred actions consolidated for a threshold jury trial on the issue of whether silicone gel breast implants cause the diseases claimed. Dow Chemical and Corning Incorporated joined in Dow Corning's motion.

On June 14, 1995, Minnesota Mining, Baxter, and Bristol-Myers Squibb also moved, pursuant to Section 157(b)(5), to transfer to the Eastern District of Michigan the opt-out cases in which those manufacturers, were named as defendants with Dow Corning.[7] In their Section 157(b)(5) motions, Minnesota

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Corning, Dow Chemical and Corning have stated that "[t]housands of the suits against Dow Corning have included claims against Dow Chemical and Corning, even though neither of those companies designed, manufactured, tested, or sold breast implants." Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 9. The companies have explained that "[p]laintitfs have generally alleged that the Shareholders are liable for Dow Corning's acts because they purportedly (1) negligently undertook Dow Corning's duties in connection with Dow Corning's products, (2) aided and abetted Dow Corning's manufacture and sale of unsafe products, or (3) conspired with Dow Corning in the sale by Dow Corning of unsafe or inadequately tested products." Id. at 9-10. Dow Corning's transfer motion covered about one-third of the breast implant claims brought by opt-out plaintiffs against Dow Corning.

[7] The Minnesota Mining, Baxter, and Bristol-Myers Squibb motions were limited to personal injury actions in which Dow Corning was a named codefendant with one or more of those parties and the plaintiffs had opted out of the Global Settlement. According to Minnesota Mining, "when [Dow Corning] filed for chapter ll, [it] was a codefendant with [Minnesota Mining] in approximately 75% of implant cases against [Minnesota Mining] . . . [i]n virtually every case, plaintiffs asserted claims of joint and several liability against [Minnesota Mining] and [Dow Corning] for the full amount of their asserted damages. Additionally, approximately 60% of the cases against [Minnesota Mining] involved plaintiffs who had received multiple sets of breast implants, in separate operations, including implants made by [Minnesota Mining] and at least one other manufacturer, which in most cases

Mining, Baxter, and Bristol-Myers Squibb also asked the district court to order that the claims at issue be transferred to the district court in which the bankruptcy case is pending so that the court could conduct a consolidated trial on the issue of causation.

On September 12, 1995, the district court issued two opinions and companion orders regarding the Section 157(b)(5) transfer motions. With respect to opt-out breast implant cases pending against Dow Corning, the district court asserted jurisdiction under Section 1334(b) and permitted transfer pursuant to Section 157(b)(5). The district court, however, denied the remainder of the transfer motions on the ground that, as a matter of law, it lacked subject matter jurisdiction over the claims sought to be transferred because they were not "related to" Dow Corning's bankruptcy proceeding pursuant to 28 U.S.C. § 1334(b). In denying the transfer motions, the district court also directed that individual federal courts nationwide dismiss or sever Dow Corning and/ or remand the combined opt-out actions to state court, and enjoined the nondebtor codefendants from removing any other cases from state to federal court pursuant to 28 U.S.C. § 1452 if the only basis for such removal was 28 U.S.C. § 1334(b) or 28 U.S.C. § 1367(a). In a September 14, 1995 order, the district court extended its rulings to include opt-in breast implant claims.

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included [Dow Corning]." Brief for Minnesota Mining and Manufacturing Company at 6. The Baxter motion "covered personal injury actions in which both the Debtor and Baxter were named defendants and the plaintiff had opted out of the Global Settlement." Brief for Baxter Healthcare Corporation and Baxter International Inc. at 3. Baxter has stated that the actions in which "both the Debtor and Baxter are defendants number more than 5,000 . . . in most of which the Debtor and Baxter are alleged to be joint tortfeasors and jointly and severally liable for the damages asserted." Id. at 9. Bristol-Myers Squibb motion explained that the company sought to have the district court transfer the opt-out cases in which it was a named codefendant with Dow Corning. Brief for Bristol-Myers Squibb Company and Medical Engineering Corporation at 5. The Minnesota Mining, Baxter. and Bristol-Myers Squibb motions covered approximately two-thirds of the breast implant claims asserted by opt-out plaintiffs against Dow Corning.

Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb subsequently filed appeals seeking review of the district court's partial denial of their motions to transfer. Those appeals were consolidated on October 10, 1995, and we are now faced with a complex set of questions pertaining to the scope of a district court's jurisdiction when it sits in bankruptcy, and its power to fix venue for the trial of wrongful death and personal injury tort claims that are "related to" a bankruptcy proceeding. In addressing these issues, we begin, as we do in any case involving a question of statutory construction, with the express language of the statute at issue and an examination of Congressional intent. In addition, we recognize that our decision will significantly impact the future course of this massive litigation. Realizing that we cannot satisfy all competing interests perfectly, our primary goal is to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible. In seeking to achieve that goal, we are called upon to balance four different, and frequently competing, interests: those of the individuals who have brought and will bring breast implant claims; Dow Corning's interests with regard to its attempt to formulate a successful reorganization plan; Dow Chemical and Corning Incorporated's interests as shareholders of Dow Corning; and the judicial system's interest in allocating its limited resources effectively and efficiently.

II.

As a threshold matter, we must determine whether the district court's partial denial of the motions to transfer is immediately appealable. These issues are certainly fluid. Our general jurisdiction to review a decision or order of a district court sitting in bankruptcy is governed by 28 U.S.C. § 1291. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir.1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) ("*A.H. Robins Co. I*"); *In re Salem Mortgage Co.*, 783 F.2d 626, 629 n. 15 (6th Cir.1986) (stating that

Congress apparently assumed Section 1291 would be available for bankruptcy appeals because that provision was at one time proposed to be the exclusive source of such jurisdiction). Title 28 U.S.C. § 1291 permits appeals only from "final decisions of the district courts." This finality requirement is considered "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *In re Cottrell*, 876 F.2d 540, 541-42 (6th Cir.1989)(citing *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir.1985)). In bankruptcy cases, "a 'functional' and 'practical' application [of Section 1291] is to be the rule." *A.H. Robins Co. I*, 788 F.2d at 1009. The reason for a more relaxed rule of appealability in bankruptcy cases is that:

> Bankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.

Id. at 1009 (citations omitted). Therefore, where an order in a bankruptcy case "finally dispose[s] of discrete disputes within the larger case," it may be appealed immediately. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir.1983). We find that the district court's order entered in bankruptcy satisfies the finality requirement of Section 1291 for purposes of appealability.

We also believe appealability of the district court's order is sustainable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Cohen* holds that it is not always necessary that a judgment terminate an action before an appeal may be brought, and permits appellate review of decisions which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225-26.

A collateral order is reviewable under *Cohen* when it: (1) conclusively determines the disputed question; (2) resolves an important question completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 988 (3d Cir.1984) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978)). These three factors are equally fluid and are applied flexibly in determining whether an order involving a bankruptcy proceeding is reviewable. *In re Pan Am Corp.*, 16 F.3d 513, 515 (2d Cir.1994) ("*In re Pan Am Corp. I*"). Here we believe these conditions have been satisfied on all grounds. The district court's order conclusively determines that claims pending against the nondebtor defendants are not "related to" Dow Corning's bankruptcy proceeding for purposes of Section 1334(b). In addition, resolution of the "related to" jurisdictional question does not involve consideration of the merits of the pending tort claims. Finally, due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered.

Because appellate jurisdiction exists, we turn to the questions on appeal.

III.

The first issue to be resolved is whether the district court has subject matter jurisdiction over breast implant claims pending not only against the debtor, Dow Corning, but also over certain claims pending against the nondebtor defendants. The nondebtor defendants argue that such jurisdiction exists pursuant to 28 U.S.C. § 1334(b) or, alternatively, 28 U.S.C. § 1367(a). We review the district court's jurisdictional ruling *de novo*. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir.1991) (citation omitted).

Section 1334 grants jurisdiction to district courts in bankruptcy cases and proceedings as follows:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to cases under title 11*.

28 U.S.C. § 1334 (emphasis added).

In addressing the extent of a district court's bankruptcy jurisdiction under Section 1334(b) over civil proceedings "related to" cases under title 11, we start with the premise that the "emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases." *In re Salem*, 783 F.2d at 634. Although "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement" of Section 1334(b), *Robinson v. Mich. Consol. Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir.1990), Congressional intent was "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1499 (1995) (citations omitted).

The definition of a "related" proceeding under Section 1334(b) was first articulated by the Third Circuit in *Pacor*. As stated in that case, the "usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling

and administration of the bankrupt estate." *Id.* A proceeding "need not necessarily be against the debtor or against the debtor's property" to satisfy the requirements for "related to" jurisdiction. *Id.* However, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section [1334(b)]." *Id.* (stating also that "[j]udicial economy itself does not justify federal jurisdiction"). Instead, "there must be some nexus between the 'related' civil proceeding and the title 11 case." *Id.*

Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 (noting in doing so that circuit courts have "uniformly adopted an expansive definition of a related proceeding under section 1334(b)"). The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir.1991); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir.1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 and n.19 (11th Cir.1990); *In re Fietz*, 852 F.2d 455, 457 (9th Cir.1988); *In re Wood*, 825 F.2d 90, 93 (5th Cir.1987); *In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir.1987); *A.H. Robins Co. I*, 788 F.2d at 1002 n. 11. According to the Supreme Court, the Second and Seventh Circuits have adopted slightly different tests for determining whether Section 1334(b) jurisdiction exists. *Celotex*, 115 S.Ct. at 1499 n. 6 (citing *UNR Indus., Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1103 (7th Cir.1991), *cert. denied* 503 U.S. 971 (1992) and *In re Turner*, 724 F.2d 338, 341 (2d Cir.1983)).

In addition, the Supreme Court recently cited *Pacor* with approval in addressing the broad scope of the jurisdictional grant in Section 1334(b). The Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in [Section] 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to

> either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of [Section] 1334(b) must be read to give district courts (and bankruptcy courts under [Section] 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex, 115 S.Ct. at 1498-99 (citations omitted) (recognizing at the same time that a bankruptcy court's jurisdiction cannot be limitless). The Court also stated that proceedings "related to" a bankruptcy proceeding include "suits between third parties which have an effect on the bankruptcy estate." *Id.* at 1499 n. 5 (citing 1 Collier on Bankruptcy § 3.01[1][c][iv], pp. 3-28 (15th ed.1994)). With these standards in mind, we turn to an examination of whether subject matter jurisdiction exists pursuant to Section 1334(b) over joint claims pending against Dow Corning and the various nondebtor defendants.

In their briefs and at oral argument, Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb proposed several theories for the existence of Section 1334(b) subject matter jurisdiction over certain breast implant claims pending against the nondebtor defendants, no one of which has been clearly determined to definitively confer "related to" jurisdiction under Section 1334(b). Specifically, the defendants argued that contingent claims for contribution and indemnification, jointly-held insurance policies,[8] the possibility of collateral estoppel with a corresponding increased exposure to liability, and the burden of defending against the overwhelming number of breast implant claims all give rise to the possibility that the Dow Corning estate will be seriously impacted if the claims at

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[8] Dow Chemical and Corning Incorporated are co-insured with Dow Corning under various liability policies.

issue, all of which to some degree affect the reorganization of Dow Corning under Chapter 11, are permitted to proceed in separate forums nationwide. We believe two of these theories support a finding that the district court has "related to" jurisdiction over claims at issue, and address them in turn.[9]

1. Claims for Contribution and Indemnification

Dow Corning, Dow Chemical and Corning Incorporated argue that the district court erred in its determination that "related to" jurisdiction does not exist over certain breast implant claims asserted against Dow Chemical and Corning Incorporated because, in addition to the claims asserted by the personal injury claimants, Dow Chemical and Corning Incorporated have asserted cross-claims against each other and Dow Corning in the underlying litigation, which will have an effect on the bankruptcy estate.[10] Minnesota Mining, Baxter, and Bristol-Myers Squibb argue that, despite the fact that they have not yet filed contribution and indemnification claims or proofs of claim relating to implant litigation in Dow Corning's bankruptcy case, they have contingent claims for contribution and indemnification that will have a conceivable effect on the bankruptcy proceedings. Minnesota Mining, Baxter, and Bristol-Myers Squibb therefore argue that the breast implant claims covered by their Section 157(b)(5) motions will give rise to thousands of claims against Dow Corning for indemnification and contribution. In addition, the nondebtor defendants claim that Dow Corning may itself have claims against them for contribution and indemnification

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[9] In our original opinion, we addressed the two additional arguments proffered by the movants in support of their assertion that "related to" jurisdiction exists over claims pending against Dow Corning and the nondebtor defendants. Upon reconsideration, we believe our finding that "related to" jurisdiction exists is best supported by the contribution and indemnification and joint insurance theories.

[10] According to Dow Corning, Dow Chemical, and Corning Incorporated, the shareholders have asserted "thousands of cross-claims for indemnity and contribution against Dow Corning in breast implant suits." (Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 21).

under theories of joint and several liability. The companies argue that these claims need to be resolved as part of Dow Corning's bankruptcy proceedings and reorganization plan, and certainly will affect the debtor's rights, liabilities, options, and freedom of action in the administration of its estate.

Relying on *Pacor*, the district court rejected this basis for "related to" jurisdiction and held that the possibility of contribution or indemnification should only be regarded as relevant if and when judgments are actually entered against the nondebtors. The district court stated:

> In the instant case, as in *Pacor*, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502.

Pacor involved John and Louise Higgins' claim against the Philadelphia Asbestos Co. (Pacor) in state court seeking damages allegedly caused by Mr. Higgins' work-related exposure to asbestos supplied by the company. In response, Pacor filed a third-party complaint impleading the Johns-Manville Corporation, which Pacor claimed was the original manufacturer of the asbestos. After Johns-Manville filed for Chapter 11, a dispute ensued as to whether the Higgins-Pacor action was "related to" the Manville bankruptcy so that the entire controversy could be removed to bankruptcy court. The Third Circuit held that the primary Higgins-Pacor action would not affect the Manville bankruptcy estate, and therefore was not "related to" the bankruptcy proceedings. The court stated that the Higgins-Pacor action was, "[a]t best, a mere precursor to the potential third party claim for indemnification by Pacor against Manville," and held that, because all issues with regard to Manville's possible liability would be resolved in a subsequent third party impleader action, "there would be no automatic creation of liability against Manville on account of

a judgment against Pacor." *Pacor*, 743 F.2d at 995 (stating also that "[t]here would therefore be no effect on administration of the estate, until such time as Pacor may choose to pursue its third party claim"). Thus, the court in *Pacor* viewed the absence of "automatic" liability on the part of the debtor as dispositive in determining that Section 1334(b) "related to" jurisdiction did not exist.

It has become clear following *Pacor* that "automatic" liability is not necessarily a prerequisite for a finding of "related to" jurisdiction. The Third Circuit itself has emphasized that:

> A key word in [the] test is "conceivable." Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park Inc., 943 F.2d 261, 264 (3d Cir.1991) (citation omitted).

Our Circuit has held that Section 1334(b) "does not require a finding of definite liability of [an] estate as a condition precedent to holding an action related to a bankruptcy proceeding." *In re Salem*, 783 F.2d at 635. In *In re Salem*, our Court reversed a district court's determination that it lacked Section 1334(b) subject matter jurisdiction over a proposed settlement order entered by the bankruptcy court. Prior to bankruptcy, Salem Mortgage Company and related debtor and nondebtor corporations acted as mortgage brokers. Salem and three related corporations filed voluntary petitions under Chapter 11 and the bankruptcy court ordered the petitions of the four debtors consolidated for administration. The Michigan Attorney General subsequently filed an adversary proceeding against the debtors and eight other defendants. The major parties in interest negotiated a stipulation for temporary class certification and a proposed final consent judgment, which was conditionally approved by the bankruptcy court. The bankruptcy court eventually entered a Proposed Order Approving Class Certification, Settlement of Class Action

Litigation, and Entry of Consent Judgment. While reviewing the proposed order, the district court raised the question of whether it possessed "related to" subject matter jurisdiction over the adversary proceeding, and concluded it did not. Our Court reversed that determination stating:

> The proposed order in this case provided that the plaintiff classes would release all claims against the debtors arising from the mortgage transactions except for claims concerning the alleged misappropriation of escrow funds. The order also provided that the debtors pay civil penalties under the Michigan Consumer Protection Act. The corporations' penalties are to be subordinated to the claims of the general creditors. Resolution of the dispute, moreover, will affect the liability of the debtors to the investors. For example, to the extent the value of the mortgages is reduced by their reformation, the investors may have an action against the debtors such as breach of the assignment agreement. Because of the nature of these mortgage transactions, we hold that this dispute is sufficiently related to the estate of the bankrupt such that the district court had jurisdiction over the subject matter.

Id. at 634. The Court stated that the case was distinguishable from *Pacor* on the ground that a finding of definite liability of an estate is not a prerequisite to holding an action "related to" a bankruptcy proceeding, and because the parties in the mortgage transactions in the proceeding at issue were "more intertwined" than the parties in *Pacor*. *Id.* at 635.

This Court's decision in *In re Salem* has been cited for the proposition that "when [a] plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." *In re Wood*, 825 F.2d at 94 (citing *In re Salem*, 783 F.2d at 634). *In re Wood* involved a dispute among the directors/stockholders of a medical clinic. Dr. Arthur Wood, III sued Dr. and Mrs. James Wood and Woodrow Barham for the wrongful appropriation of corporate assets. Before the filing of Dr. Arthur Wood's single complaint

against all three defendants, Dr. and Mrs. James Wood had filed a Chapter 11 petition. A dispute subsequently ensued as to whether the entire matter fell within bankruptcy jurisdiction. The Fifth Circuit held that the "complaint [was] sufficiently related to the pending bankruptcy to allow the district court to exercise jurisdiction under section 1334." *In re Wood*, 825 F.2d at 93. The Court further stated:

> The complaint against the bankruptcy debtors could have a conceivable effect on their bankruptcy. The plaintiff seeks to recover stock and monies that the debtors allegedly appropriated from the clinic. They seek to resolve the disputed allocation of interest in the clinic. To the extent that the debtors' interest in the clinic, their stock holdings, or their withdrawals are now property of the estate, the complaint against them has a potential effect on their estate.

Id. at 93-94. The Court acknowledged the possibility that the complaint, which raised a post-petition claim, could ultimately have no effect on the bankruptcy proceeding. Unable, however, to conclude that the suit would have *no* conceivable effect on that proceeding, the court found "related to" jurisdiction as to both the debtor and nondebtor defendants, stating:

> The plaintiff has filed one complaint against the defendants seeking liability for their joint conduct. Success against any of the defendants will have a potential effect on the estate. For example, if Dr. Wood and his wife are held liable but Barham is not, the bankrupt estate may bear the entire burden of the judgment. If, on the other hand, Barham is found jointly liable, the estate may bear only a portion of the judgment. Moreover, in filing the complaint, the plaintiff challenged the combined actions of both the debtors and Barham, a non-debtor. Resolution of the dispute will necessarily involve, therefore, consideration of Barham's involvement in those actions. We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that

> when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334.

Id. at 94.

The degree of identity between a debtor and nondebtor codefendants was an important factor in *A.H. Robins Co. I*, a mass tort case involving the Dalkon Shield, an intrauterine contraceptive device. In that case, A.H. Robins was faced with an overwhelming number of federal and state actions seeking damages for injuries allegedly sustained by the use of the Dalkon Shield. The pending litigation caused A.H. Robins, the manufacturer of the device, to file a petition under Chapter 11 of the Bankruptcy Code. By the time A.H. Robins filed its petition, over 5,000 suits had been filed. More than half named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. When the filing of the petition automatically stayed all suits against A.H. Robins under Section 362(a), a number of plaintiffs in suits in which A.H. Robins was named along with at least one codefendant sought to sever their actions against A.H. Robins and proceed against the codefendant or codefendants. A.H. Robins then sought injunctive relief restraining the prosecution of the actions against its codefendants. The district court granted a preliminary injunction, holding that all actions that might be satisfied from proceeds of the debtor's products liability policy with Aetna Casualty and Insurance Company were stayed, and enjoined further litigation in eight civil actions.

Shortly after entry of the preliminary injunction, A.H. Robins moved for: a determination of trial venue of all Dalkon Shield suits; identification of such cases as were "related to" the Chapter 11 case; and transfer of such cases to the Eastern District of Virginia for trial. The district court held that: (1) pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to the Chapter 11 case; (2) pursuant to Sections 157(b)(5) and

1334(b), all such actions, wherever pending, were to be tried in the Eastern District of Virginia; (3) all actions related to the Chapter 11 case then pending in or subsequently removed to any federal district court during the pendency of the Chapter 11 case were to be transferred to the Eastern District of Virginia; and (4) the court was not prevented from later abstaining under Section 1334(c)(1) or remanding under Section 1452(b). This order and the preliminary injunction were both appealed to the Fourth Circuit.

In discussing the propriety of the stay issued against A.H. Robins' nondebtor codefendants, the Fourth Circuit stated that, although Section 362(a)(1) is generally available only to a debtor, proceedings against nonbankrupt codefendants may be stayed by a bankruptcy court where there are "unusual circumstances." *A.H. Robins Co. I*, 788 F.2d at 999. Such a situation arises when "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* The court stated that "an illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *Id.* In addition, such a relationship may exist where codefendant liability is "directly attributable to the debtor." *Id.* at 1004.

Based on the principles outlined above, we believe the district court has "related to" subject matter jurisdiction over the breast implant claims pending against the nondebtor defendants in this case. Thousands of suits asserted against Dow Corning include claims against the nondebtors, and the nature of the claims asserted establishes that Dow Corning and the various nondebtor defendants are closely related with regard to the pending breast implant litigation.[11] Dow Chemical and

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[11] The opt-out claims asserted against Dow Corning and the various nondebtor defendants generally can be divided into four categories: (i) "Multiple Implant Actions," which are actions where plaintiffs received implants manufactured by both Dow Corning and one or more of the nondebtors; (ii) "Supplier Actions," which involve

Corning Incorporated have already asserted cross-claims against each other and Dow Corning in the underlying litigation, and the other nondebtor defendants have asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time.

We find that it is not necessary for the appellees first to prevail on their claims against the nondebtor defendants, and for those companies to establish joint and several liability on Dow Corning's part, before the civil actions pending against the nondebtors may be viewed as conceivably impacting Dow Corning's bankruptcy proceedings. The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning which unquestionably could ripen into fixed claims. The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's

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claims against the nondebtors as manufacturers and claims against Dow Corning as the supplier of silicone materials to the nondebtors; (iii) "Conspiracy Actions," which allege that Dow Corning and the nondebtors conspired to defraud the plaintiffs by fraudulently withholding material information regarding the hazards of breast implants: and (iv) "Form Complaint Actions," which simply name Dow Corning and the nondebtors as defendants without making any specific allegations of individual wrongdoing. (See Motion of Minnesota Mining and Manufacturing Company for an Order Pursuant to 28 U.S.C. § 157(b)(5) at 7).

reorganization plan as that posed by the thousands of potential indemnification claims at issue here.

Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent codefendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated. We conclude that Section 1334(b) jurisdiction exists over the actions pending against Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb that are the subject of the companies' Section 157(b)(5) motions.

2. Joint Insurance

Dow Corning, Dow Chemical and Corning Incorporated also argue that "related to" jurisdiction exists as to claims pending against the shareholders because the three companies share joint insurance. We believe this argument provides additional support for the existence of "related to" jurisdiction under the unique facts of this case, but address it only briefly because we have already concluded that Section 1334(b) jurisdiction exists over breast implant claims pending against Dow Corning and one or both of its parents.

Dow Corning, Dow Chemical and Corning Incorporated are co-insured under various insurance policies, which together provide over $1 billion in coverage. Dow Corning's interest in the policies is one of the largest assets of its bankruptcy estate. In addition, Dow Corning recently entered into ten new insurance settlements under which the estate will receive, if approved by the bankruptcy court, approximately $350 to $450 million in cash. Most of these settlements involve policies under which Dow Chemical or Corning Incorporated is a co-insured.

Dow Corning, Dow Chemical, and Corning Incorporated claim that the district court's order, by allowing thousands of claims to proceed separately against Dow Chemical and Corning Incorporated, will diminish the value of this major bankruptcy asset to the extent that settlements, judgments and defense costs incurred by the shareholders will exhaust pol-

icy limits otherwise available to Dow Corning, its creditors, and individuals asserting claims in the bankruptcy proceedings. In addition, all three co-insureds argue that the policies will be further diminished if and when payments must be made to Minnesota Mining, Baxter, or Bristol-Myers Squibb. Dow Chemical has already notified insurers that it is asserting claims against the jointly-held policies on the ground that, as a co-insured, it is entitled to recover from the insurers all of its defense costs, as well as any settlements or judgments paid by it in litigating breast implant claims. The concern, then, is that permitting scores of trials against the shareholders to go forward while litigation against the debtor is stayed may result in the shareholders making claims for insurance and seeking and obtaining payment from the insurers before Dow Corning is able to make any claims of its own.

The district court rejected this argument for the existence of "related to" jurisdiction, holding that, while a bankruptcy court has broad discretion over a debtor's interest in a liability insurance policy shared with a nondebtor, no judgment has been entered yet against Dow Chemical or Corning Incorporated and neither company has a claim pending against the insurance policies at this time. We believe the district court is in error because, as we stated earlier, an immediate impact on a debtor's estate is not a prerequisite for Section 1334(b) jurisdiction. Under the facts of this case, we believe the possible depletion of insurance policies depends on contingencies sufficiently immediate to support a finding of "related to" jurisdiction. *See, e.g., A.H. Robins Co. I*, 788 F.2d at 1008 (stating that "irreparable harm would be suffered by the debtor and by the defendants since any of [the] suits against [the] co-defendants, if successful, would reduce and diminish the [debtor's] insurance fund"); *In re Zale Corp.*, 62 F.3d 746, 758-59 (5th Cir.1995) (concluding that, where disputes regarding an insurance policy can have an effect on a debtor's estate, the bankruptcy court has "related to" jurisdiction over nondebtors' claims against the insurer); *Coar v. National Union Fire Ins. Co.*, 19 F.3d 247, 249 (5th Cir.1994) (stating that, where there is a "cognizable threat" that insurance policy proceeds would not cover plaintiffs' claims and could

expose the debtor's estate to liability, a suit against a debtor's insurer is "related to" the debtor's bankruptcy case); *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir.1988) (noting that the scope of a products liability insurance policy affects the size of a debtor's estate for distribution).

Dow Corning's interest in the insurance policies at issue is property of its estate under the expansive definition set forth in 11 U.S.C. § 541(a)(1). The threat posed to those insurance policies if claims pending against Dow Chemical and Corning Incorporated are permitted to go forward in a separate manner supports a finding of "related to" jurisdiction under Section 1334(b). The prospect of Dow Chemical and Corning Incorporated being able to assert mature, liquidated claims against the insurance proceeds if litigation pending against them is permitted to go forward demonstrates a conceivable impact on the bankruptcy proceedings. If it is determined that Dow Chemical or Corning Incorporated has a priority to the insurance proceeds, even if the bankruptcy court has the power to prevent payments of the proceeds while Dow Corning is in bankruptcy, the risk remains that the insurance coverage may be eviscerated when the proceeds are eventually distributed. In addition, certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately. In addition, the bankruptcy court has yet to determine whether it has the power to prevent Dow Corning's co-insureds from receiving proceeds of the jointly-held policies while Dow Corning is in bankruptcy. Resolution of the dispute over the right to proceeds alone will have a conceivable effect on Dow Corning's bankruptcy proceedings.

IV.

We next address the power of the district court, sitting in bankruptcy, to fix the venue for the trial of personal injury tort and wrongful death claims asserted in non-bankruptcy

forums pursuant to 28 U.S.C. § 157(b)(5). Section 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The purpose of Section 157(b)(5) is "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.' " *A.H. Robins Co. I*, 788 F.2d at 1011 (citation omitted). Centralization of claims increases the debtor's odds of developing a reasonable plan of reorganization which will "work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims." *Id.*

It has been established that a "bankrupt debtor who is a defendant in a personal injury action may move under section 157(b)(5) to transfer the case to one of two venues: (1) the district where the bankruptcy is proceeding; or (2) the district where the claim arose." *In re Pan Am Corp. I*, 16 F.3d at 516. The question for our consideration is whether Section 157(b)(5) allows for the transfer of personal injury and wrongful death claims pending against nondebtor defendants who have been sued with a debtor under claims of joint and several liability.

The Fourth Circuit has construed Section 157(b)(5) as permitting the transfer of such cases, and we follow that Circuit's approach. In *A.H. Robins Co. I*, by the time A.H. Robins filed its Chapter 11 petition, 5,000 suits were pending against the company. More than half of those cases named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. After the district court issued a preliminary injunction against suits by A.H. Robins' codefendants, A.H. Robins moved for a determination of trial venue of all Dalkon Shield suits, an identification of cases "related to" the bankruptcy case, and the transfer of those cases to the

district court where the bankruptcy proceedings were being held for trial. The district judge held that, pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings "related to" A.H. Robins' Chapter 11 case and that, pursuant to Sections 1334(b) and 157(b)(5), all such actions, wherever pending, were to be tried in the Eastern District of Virginia. In addition, the district court held that all actions "related to" the Chapter 11 case then pending in any federal district court or subsequently removed to any federal district court during the pendency of A.H. Robins' bankruptcy case were to be transferred to the Eastern District of Virginia.

In reviewing the validity of the district court's order fixing the venue for the trial of all Dalkon Shield cases and transferring such cases to the Eastern District of Virginia, the Fourth Circuit stated: "Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases." *Id.* at 1010 (stating also that the power of the district court to fix venue for all the pending Dalkon Shield tort cases is "stated in unmistakable terms in section 157(b)(5)"). The Fourth Circuit stated its intent in consolidating the Dalkon Shield litigation as follows:

> Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the

> claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. In addition, the real purpose of the proceedings (i.e., a reorganization of the debtor and its continuance as a going business) could be attained.

Id. at 1013 (footnote omitted). The court stated that these objectives could not be achieved until "all Dalkon Shield claims and suits [were] centralized before a single forum where all interests [could] be heard and in which the interests of all claimants with one another [could] be harmonized." *Id.* at 1014. The court concluded by stating:

> That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

Id. at 1014.

We agree with the Fourth Circuit that Section 157(b)(5) should be read to allow a district court to fix venue for cases pending against nondebtor defendants which are "related to" a debtor's bankruptcy proceedings pursuant to Section 1334(b).[12] This approach will further the prompt fair, and complete resolution of all claims "related to" bankruptcy proceedings, and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate.

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[12] We note that our holding here is limited to the district court's ability to consider motions under 28 U.S.C. § 157(b)(5) with respect to the trial venue of the breast implant claims at issue.

V.

Finally, a Section 157(b)(5) motion "requires an abstention analysis." *In re Pan Am Corp.*, 950 F.2d 839, 844 (2d Cir.1991) ("*In re Pan Am Corp. II*"). The abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. *In re Salem*, 783 F.2d at 635. It is for the district court to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases." *Id.*

Section 1334 provides for two types of abstention: discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Section 1334(c)(2) states in relevant part:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Non-core proceedings under Section 157(b)(2)(B) (i.e. liquidation of personal injury tort or wrongful death case)

are not subject to Section 1334(c)(2)'s mandatory abstention provisions pursuant to 28 U.S.C. § 157(b)(4).[13]

The district court in this case determined that Section 157(b)(4) rendered exempt from the mandatory abstention requirement all personal injury tort claims pending solely against Dow Corning, and decided not to abstain discretionarily with regard to those claims at this time. Because the district court found that it did not have subject matter jurisdiction over the claims pending against the nondebtor defendants, it did not address the abstention issue in detail and merely incorporated by reference its analysis of the abstention issue pertaining to claims pending solely against Dow Corning. It also remains to be fully determined whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption under Section 1334(c)(2) have been met. The district court did not directly address these matters, and we refrain from addressing them in the first instance. Because we believe the district court is in a better position to make the necessary abstention determinations, as to both mandatory and discretionary abstention, we remand the case to the district court for further proceedings on this issue.

VI.

We REVERSE the district court's determination that it lacked subject matter jurisdiction over the tort claims pending against the nondebtor defendants and that it did not have the power to transfer those claims pursuant to Section 157(b)(5). In addition, we REMAND this case to the district court for further proceedings on the issue of Section 1334(c) abstention.

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[13] Section 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

Dated: Sept. 12, 1995.

In Re: DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER
ON THE DEBTOR DOW CORNING'S
MOTION TO TRANSFER

HON. DENISE PAGE HOOD

I. *INTRODUCTION/FACTS:*

This matter is before the court on the Debtor Dow Corning Corporation's motion to transfer certain breast implant cases to the United States District Court, Eastern District of Michigan pursuant to 28 U.S.C. § 157(b)(5). Responses were filed and a hearing was held on the matter.

At the onset, the Court is very cognizant of the rights of the claimants involved in this matter under our judicial system as well as the protections afforded to the Debtor Dow Corning under our bankruptcy laws. With these sometime competing interests in mind, the Court has attempted to balance the rights of both the Debtor and the claimants in its decision.

On May 15, 1995, the Debtor, Dow Corning Corporation, sought a voluntary petition for reorganization under Chapter

11 of the Bankruptcy Code with the Bankruptcy Court of the United States District Court, Eastern District of Michigan, Northern Division in Bay City, before the Honorable Arthur J. Spector. On June 12, 1995, the Debtor filed a motion to transfer certain breast implant cases before the Bankruptcy Court. Judge Spector entered a Determination and Report and Recommendation Regarding the Debtor's Motion to Transfer on June 13, 1995 indicating that the District Court had jurisdiction over this motion. On July 5, 1995, this Court entered an order provisionally transferring the opt-out breast implant cases involving the Debtor only to the Eastern District of Michigan pending a hearing scheduled for the motion on July 31, 1995.

Debtor is a leading producer of silicone products. Dow Corning was formed in 1943 as a corporation owned by Corning Incorporated and Dow Chemical Company (each has a 50% ownership interest) to develop and produce silicones and silicone products during World War II. In 1994, the Debtor Dow Corning's total sales were nearly $2 billion. The Debtor manufactured breast implants for commercial use from approximately 1964 until 1992. During a part of this time, the Debtor also supplied certain raw materials to other breast implant manufacturers. According to the Debtor, in the year of its highest sales in 1991, breast implants only accounted for less than 1% of the Debtor's sales.

Silicone gel breast implants consist of a silicone elastomer "envelope" filled with silicone gel. The implants are surgically implanted for purposes of breast reconstruction in breast cancer patients and for cosmetic reasons. These implants have the same chemical make up as silicone materials used to make catheters, shunts, pacemaker leads and other medical devices.

In the early 1980s, silicone breast implants were subject to occasional product liability lawsuits. By 1987, 50 such lawsuits had been filed. In 1990 and 1992, over 100 lawsuits were filed against the Debtor. However, beginning in 1992, the implant litigation drastically increased. Over 3,000 suits were filed against the Debtor in 1992, over 8,000 in 1993 and

over 7,000 in 1994. The litigation included both individual claims and actions on behalf of putative classes. By early 1995, the Debtor was a Defendant in 45 putative class action lawsuits (31 in various federal district courts, 12 in state courts and 2 in Canada) and over 19,000 individual lawsuits. All the suits combined involved more than 36,000 claimants. The Debtor was sued both as the manufacturer of breast implants and supplier of silicone raw materials to other breast implant manufacturers.

According to the Debtor, these claims uniformally allege that breast implants cause diseases, including autoimmune disease, scleroderma, systemic disorders, joint swelling and chronic fatigue. The damages sought in these cases are substantial, ranging from hundreds of thousands to tens of millions of dollars in compensatory and punitive damages. Claims involving mechanical defects, including rupture of the implants, are also alleged by the claimants.

In June 1992, pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multi District Litigation ("MDL") ordered that federal actions involving breast implants be transferred to the Honorable Sam C. Pointer in the Northern District of Alabama for coordinated or consolidated pretrial proceedings ("MDL No. 926"). *In re Silicone Gel Breast Implants Products Liability Litigation*, MDL No. 926, 793 F.Supp. 1098 (J.P.M.L. 1992).

The Debtor asserts that as that litigation progressed, so did efforts to achieve a global resolution of this controversy. Although the Debtor contends that its products were safe and did not cause the diseases being claimed, it was compelled to recognize that its resources were not unlimited and that the litigation was diverting management's attention from the company's core businesses and that the costs of continued litigation would be substantial. According to the Debtor, in 1994, its litigation costs exceeded $200 million.

After months of negotiations with codefendants and claimants, a court-approved "Steering Committee" representing breast implant claimants, the Debtor and other

implant manufacturers entered into a "global settlement" of breast implant claims on March 23, 1994. The Debtor agreed to contribute up to $2.02 billion (out of a total settlement of $4.25 billion) of the funding required by the settlement. Judge Pointer approved the settlement as fair and reasonable in a September 9, 1994 Order after certifying one of the consolidated federal actions as a class action for purposes of settlement under Fed.R.Civ.P. 23(b)(3).

It appears that the global settlement did not resolve the controversy and the future of that agreement, at this time, is in question. First, the Agreement is oversubscribed in that the claims being made against the established funds exceed the Defendants' funding commitments. Second, numerous claimants have opted not to participate in the settlement, electing instead to pursue individual suits. As of May 1995, over 6,000 claimants had opted out of the global settlement and are pursuing individual actions ("opt-out" claimants). The Debtor asserts that it cannot both fund the settlement and continue to incur substantial litigation costs in connection with the opt-out claimants. These opt-out claims which led to costly proceedings in state courts, are a major reason for the Debtor's decision to seek bankruptcy protection, according to the Debtor.

In early 1992, the Food and Drug Administration ("FDA"), asked for a voluntary moratorium on the production of breast implants. Since that time, the Debtor has tried to verdict six breast implant cases involving nine claimants. The jury returned a verdict in favor of the Debtor in three of the cases, in favor of the plaintiffs in two of the cases; and in the sixth case, involving two plaintiffs, the jury found in favor of one plaintiff and against the other. According to the Debtor, none of the juries have awarded punitive damages in the post-moratorium trials.

The Debtor asserts that breast implant trials are time-consuming. Complex scientific evidence is involved in various scientific fields. The above trials ranged in length from two to eleven weeks, excluding months of preparation that

preceded each trial. According to the Debtor, the central issue was the same: whether silicone gel breast implants cause disease. The Debtor asserts that the complexity of the cases placed at a substantial disadvantage its efforts to deal with the opt-out claims which were being pursued in state courts. The state proceedings were uncoordinated and trial dates were overlapping. When it filed for bankruptcy protection, the Debtor faced approximately ninety trials over the next six months, including seven trials with twenty-eight plaintiffs in Texas during the month of June 1995. From the Debtor's perspective, these conflicting trial settings created frantic conditions that made it impossible to fairly, rationally, and efficiently resolve the central scientific issue of whether implants cause the diseases that are alleged. The Debtor states that it could not succumb to exorbitant settlement demands nor could it go to trial knowing that it could not muster the resources necessary to mount an effective defense on so many fronts simultaneously. The Debtor claims it was forced to seek bankruptcy protection under Chapter 11 of the Bankruptcy Code. However, despite the Chapter 11 proceedings and the automatic stay provisions of 11 U.S.C. § 362, the breast implant litigations are still ongoing. Plaintiffs throughout the United States have filed notices of nonsuit against, dismissals of and motions to sever the Debtor in order to proceed to trial against Dow Chemical Co. and/or Corning, Inc. In June and July 1995, suits against Dow Chemical and/or Corning were set for trial in numerous counties throughout Texas.

The Debtor has envisioned essentially a four-step process in its reorganization proceedings. The Debtor's proposal claims to have taken into account the substantive and procedural rights of the opt-out claimants and also ensures the integrity of the bankruptcy proceeding. The first step is the removal to local federal district courts of state opt-out claims involving the Debtor's implants pursuant to 28 U.S.C. § 1452(a). The second step is the instant motion to transfer, which seeks to have all of the opt-out actions then transferred

to the Eastern District of Michigan. Should the second step be granted, the third step is a motion to consolidate the transferred claims and an early trial on the threshold issue of whether implants cause the diseases being claimed pursuant to Fed.R.Civ.P. 42. The Court would oversee a consolidated, adversary trial that would focus on the scientific evidence as it relates to the core issue of causation which would be binding on all opt-out claimants. The fourth step is for the bankruptcy court to conduct an estimation or other valuation proceeding, taking into account the results of the threshold trial on causation, and to approve a plan of reorganization that is consistent with that determination. Additional proceedings may be thereafter determined by the Court at the conclusion of the estimation or valuation proceedings, taking into account the bankruptcy court's plan of reorganization.

The Official Committee of Tort Claimants ("Tort Claimants" or the "Committee") asserts in its brief in opposition to the Debtor's Motion to Transfer that Dow Chemical and the Debtor knew of and concealed from the public substantial data suggesting that silicones were dangerous to the human body. Notwithstanding the Debtor's and its parents' repeated assurances to the public that its products were safe, jury awards, settlements and a very large proposed class settlement reflect that thousands of women have suffered injuries as a result of receiving the implants. The Committee asserts that apart from the issue of disease causation, many breast implant recipients have been injured and often horribly scarred by the rupturing or leaking of implants. Countless others fear that their implants may rupture or leak in the future. These women either have had or will need to have costly and painful "explanation" surgery to remove their implants and are entitled to substantial damages regardless of whether the leaking silicone also caused a "disease." The Committee further asserts that the incidence of various conditions varies with each woman depending on their particular medical history and biological characteristics.

According to the Committee, several juries of the United States have entered verdicts, ranging into the millions of dollars, holding the Debtor liable for injuries caused by its breast implants. The Committee asserts that the Debtor hopes to wipe out these judgments and this history should it prevail in one consolidated trial in this District and eliminate its liability to tens or hundreds of thousands of injured women.

The Committee states that while the global settlement approved by Judge Pointer of over $4 billion is sizable, it is insufficient to compensate the plaintiffs for the injuries they have suffered. In a report released on June 15, 1995 by the claims administrator appointed by Judge Pointer to implement the global settlement, Texas State Court Judge Ann Cochran, 440,000 women have registered under the settlement as potential claimants.

In its Motion to Transfer, the Committee asserts that the Debtor has wreaked procedural havoc by removing numerous pending state court cases to federal courts. Many of these cases have subsequently been transferred to Judge Pointer as "tag-along" cases by the MDL Panel. These cases join the more than 10,000 actions earlier transferred to Judge Pointer pursuant to the MDL Panel's determination that joint pretrial proceedings before a single court that could develop substantial expertise would conserve resources and best serve the interests of all parties. According to the Committee, the Debtor's attempt to transfer all opt-out actions to this Court would run roughshod over the considered judgments of the MDL Panel and unnecessarily place this Court on a collision course with Judge Pointer. The Committee asserts that Judge Pointer has acquired an intimate and unrivaled familiarity with the breast implant litigation since presiding over the consolidated pre-trial proceedings in the thousands of pending federal breast implant suits in June 1992. Judge Pointer has supervised discovery that has included approximately 225 depositions and production of some 10 million pages of documents and has presided over complex and lengthy proceed-

ings to approve and implement the global settlement since spring 1994.

The Committee further asserts that the Debtor's parent corporations, Dow Chemical and Corning, Inc. are merely trying to ride the coat tails of the Debtor's bankruptcy proceedings in order to benefit from the Debtor's protection under the bankruptcy laws.

The issues before the Court are: 1) whether it has jurisdiction to transfer the claims involving the Debtor; 2) if the Court does have jurisdiction to transfer the claims, whether the Court should abstain from exercising its authority; and 3) whether it has jurisdiction over the claims against the Shareholders.

II. *ANALYSIS*

A. *Whether this Court has the jurisdiction and authority to transfer the cases to the E.D. of Michigan pursuant to 28 U.S.C. § 157(b)(5).*

It is undisputed that the Debtor's bankruptcy case is pending before the Bankruptcy Court, of the United States District Court, Eastern District of Michigan. This Court has original and exclusive jurisdiction of the Debtor's title 11 action pursuant to 28 U.S.C. § 133(a). 28 U.S.C. § 157(b)(5) provides that this District Court has the authority to determine the trial venue of any personal injury tort claims involving the Debtor.

> (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Personal injury and wrongful death claimants are specifically subject to the overarching bankruptcy policy of centralizing mass tort litigation so that the claimants' jury trial rights are preserved. *Langenkamp v. Culp*, 498 U.S. 42 (1990). Section 157(b)(5) treats personal injury claims as a special class

within the realm of bankruptcy law. *Calumet Nat'l Bank V. Levine*, 179 B.R. 117, 120 (N.D. Ind. 1995). This section confers enlarged powers upon the district court where the bankruptcy actin was filed to fix venue of personal injury claims *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 832 (5th Cir. 1993), *cert. denied*, 113 S.Ct. 2963 (1993). The district court where the bankruptcy action was filed has the sole authority for ultimately fixing the trial venue for personal injury actions against the bankruptcy debtor. *Calumet*, 179 B.R. at 123.

B. *If this Court does have jurisdiction, whether this Court has the authority to transfer certain opt-out claims from the MDL panel, Case No. 926 and MDL Judge in the N.D. of Alabama to the E.D. of Michigan.*

The Tort Claimants argue that the MDL Panel's previous order preempts this Court's authority to transfer certain opt-out claims from the MDL Panel, Case No. 926 to this Court. Other responses and objections filed with this Court have also argued that this Court has no authority to transfer cases from other districts and that only those district courts have the authority to transfer cases. Generally, the district court where the suit is pending has the sole authority to transfer a suit. However, with regards to a bankruptcy action where personal injury tort claims are involved, the Fourth Circuit in *In re A.H. Robins Co., Inc.*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986), stated:

> . . . As the appellants correctly construe [28 U.S.C.] section 1412, the authority to transfer a suit under that statute rests solely with the court in which the suit is pending and it provides no authority whatsoever to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district

court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute, was, as Congressman Kastenmeir declared, to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.' (cite omitted) That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, *personal injury tort claims against a debtor in Chapter 11 proceedings whenever pending and in that connection the section is supreme.* In all other cases related to the bankruptcy proceedings, however, the general statute (i.e., section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that '[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we can do so while preserving their sense and purpose.' (cites omitted) To accept the appellants' interpretation and to negate the plain language of § 157(b)(5) 'would violate the basic principle of construction that statutes should be read, if possible, as harmonious texts.' (cites omitted) We, therefore, have no difficulty in finding that *the district judge's authority to fix venue of personal injury tort actions against the debtor exists under § 157(b)(5), irrespective of the district in which such controversy is pending.* (emphasis added).

788 F.2d at 1011. In the *A.H. Robins* case, the Court went on to state that the first and primary purpose of the proceedings is to ascertain whether a fair reorganization of the debtor can be achieved. *Id.* at 1012. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in, the expenses of litigating the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time. *Id.* No progress along estimating these contingent claims can be made until all claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. *Id.* at 1014. However, it should be noted that *A.H. Robins* did not address a situation involving a bankruptcy court, a district court sitting in bankruptcy, and claims previously transferred by the MDL to another district court.

The MDL has its authority to transfer "civil actions" for pre-trial proceedings under 28 U.S.C. § 1407. The MDL has recognized the bankruptcy stay against bankrupt defendants before it and those claims that have been stayed remain stayed in the transferee court of the MDL. *In re Asbestos Prod. Lia. Lit.*, 771 F.Supp. 415, 421, note 6 (J.P.M.L. 1991). The MDL Panel has noted that the transferee court should coordinate with the concerned bankruptcy courts. 771 F.Supp. at 421, n. 6. *In re Apex Oil Co.*, 980 F.2d 1150 (8th Cir. 1992) also recognized that the district court sitting in bankruptcy has the authority to fix the trial venue under Section 157(b)(5) or to abstain from the suits pending before the MDL transferee court. Based on these cases, this Court has authority over the cases before the MDL that are the subject of the Debtor's motion.

C. *If this Court does have jurisdiction, whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

A motion under section 157(b)(5), also requires an abstention analysis. *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991). The Tort Claimants' brief and other Claimants' objections and responses have moved that this Court abstain under 28 U.S.C. § 1334(c).

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall not be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). This Court is exempted from mandatory abstention under Section 1334(c)(2).

2. *Discretionary Abstention.*

In their responses and at oral argument, the Claimants' attorneys urged that the Court abstain from transferring all of the breast implant cases involving the Debtor to the Eastern District of Michigan, specifically opposing the Debtor's proposition to hold one trial on the issue of causation for purposes of estimation. For the reasons more fully set forth below, the Court will not abstain its jurisdiction pursuant to 28 U.S.C. § 1334(c)(1) at this time. The Court will allow the Bankruptcy Court to proceed with the *estimation* process without holding the one causation trial requested by the Debtor.

Congress has indicated that courts should not be too quick to abstain from exercising their transfer powers under 28 U.S.C. § 157(b)(5). *In re Pan Am*, 950 F.2d at 845. Transfer should be the rule, abstention the exception. *Id.* The Court should weigh the advantages and disadvantages advanced at

the hearing. *A.H. Robins*, 788 F.2d at 1016. Factors enumerated by the *A.H. Robins* case, include:

> . . . some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted or transferred to Richmond. All of these factors are relevant.

Id. at 1016.

Issues of state law may also substantially affect the results in individual cases and must be considered. *Id.* The abstention doctrine manifests federal respect for State law and policy. *In re Pan Am*, 950 F.2d at 846. Section 1334(c)(1) of Title 28 of the United States Code provides for abstention by the district court in such instances:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). In *In re Pan Am*, the Court addressed two decisions by the district court involving its abstention from certain cases. *In re Pan Am* involved the Lockerbie air crash tragedy. The MDL panel had entered an order transferring all the federal cases to the Eastern District of New York. The *Pan Am* defendants subsequently filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. All actions against the debtors were stayed by 11 U.S.C. § 362. Shortly thereafter, the *Pan Am* defendants moved for an order pursuant to 28 U.S.C. § 157(b)(5) transferring the Florida state-court actions, known as the "Coker" and the "Rosenkranz" actions to the Southern District Court of New York, where the bankruptcy proceeding was filed. The Pan Am debtors contemplated that the transfer to the Southern District of New York would be followed by another trans-

fer to the Eastern District of New York where the MDL was pending. The District Court in the Southern District of New York decided to abstain from exercising the court's transfer powers in both cases. On appeal, the Second Circuit reversed the district court's decision as to the Coker decision because the district court's actions were based on improper considerations. The Second Circuit held that the Coker action involved federal law questions, which could not be a basis for abstention. The Second Circuit, however, affirmed the district court's decision with regards to the Rosenkranz state court action because the Court found that the two-step transfer plan would engender further delay and expense. The debtors in the *In re Pan Am* case did not seek transfer of the cases already before the MDL to the district court where the bankruptcy was pending.

The issue of abstention in relation to the MDL arose in *In re Apex Oil Co.*, *supra*. There, the Court affirmed the district court's decision to abstain while the claimants' lawsuits proceeded in the multidistrict transferee court. The debtors in Apex had filed Chapter 11 bankruptcy in the Eastern District of Missouri. Acting under the authority of 28 U.S.C. § 1334(c)(1), the district court abstained from trying the claims, reasoning that the MDL had transferred the claims to the Eastern District of Pennsylvania. The bankruptcy stay was lifted so that the claimants could pursue their claims in the Eastern District of Pennsylvania. In *Apex*, the appellants claimed that the MDL had authority to transfer "lawsuits" only, but not bankruptcy claims, and that the district court's conclusion that their "claims" had been transferred was flawed. Reviewing that decision, the Eighth Circuit found that the distinction between lawsuits and claims does not negate the fact that the district court had the statutory authority to abstain while the claimants' lawsuits proceeded in the multidistrict transferee court. The Court wrote: "[e]ven though the 'claims' themselves may not have been transferred, we are not convinced that the district court should therefore be obliged to conduct duplicative proceedings in Missouri, thus

squandering the very economies which are the purpose of the multidistrict transfer." 980 F.2d at 1153. The District Court's order requiring all claimants to proceed against the debtors in the MDL court in Pennsylvania was also affirmed, the Eighth Circuit reasoning that it served the same purpose as the original order requiring multidistrict coordination of the other related cases.

The relationship between sections 157(b)(5) and 1334(c)(1), the abstention statute, was addressed by the Sixth Circuit in *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985). The Sixth Circuit stated that in liquidating tort cases in bankruptcy, the district court should first decide whether to leave the cases with claims in the bankruptcy court in the courts where they are pending. If the Court decides against this course, the district court must then try the cases itself or send them to the federal court for the district in which they arose. *Id.* at 273. In *White Motor*, a confirmed plan of reorganization had already been established and only liquidation of damages was needed. The Sixth Circuit analysis is instructive in the instant case, even though the estimation process has not begun.

The Debtor contends that the estimation process would be more accurate if a causation trial was held first. Claimants offer that the estimation process could be accomplished within 60 days. They argue that the estimation process can be guided by the outcome of several actual trials already held as well as the number and value of cases previously settled with the Debtor. The Claimants further assert that valuation of the various types of cases by diseases and injuries already exists as a result of the Global Settlement in the breast implant cases. One causation trial is not needed for the estimation process where information already exists to accomplish the estimation process. The estimation should proceed before trial.

At oral argument, the Official Committee of Unsecured Creditors, arguing in favor of the transfer of all breast implant cases so that one causation trial can be held for the purpose of

estimation, addressed four cases for the Court to use as a guide for this proposition. Cited as a model for the causation trial is *In re Bendictin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989). In that case, the Sixth Circuit affirmed the district court's trifurcation of the issues involving a products liability action. Although the Sixth Circuit affirmed the decision to hold one trial on the causation only, the *Bendictin* case did not involve a bankruptcy claim and the estimation of certain unliquidated, contingent claims from personal injury tort claims.

A second case cited in support of the Debtor's position is *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2nd Cir. 1992). In that case, the district court approved a settlement agreement involving the debtor and a mandatory non-opt-out class of claimants. However, there was no issue of one causation trial for the purpose of estimation in that case. The *Drexel* case involved a settlement agreement pending confirmation of the debtor's reorganization plan. A causation trial was not involved in order to estimate the unliquidated and contingent claims in that case. It should also be noted that the *Drexel* case does not involve personal injury or wrongful death claims.

The third case is *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1498-1499 (1995). The *Celotex* case only addresses the issue of whether or not the execution of a supersedeas bond based on a judgment in one district court is related to the debtor's bankruptcy pending in another district court. The case did not involve the issue of a causation trial held for the purpose of estimation.

The *A.H. Robins, supra*, is cited as the fourth case in favor of the transfer of cases and one causation trial for the purposes of estimation. In *A.H. Robins*, the Court noted that the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims despite Section 157(b)(5) and before a trial is commenced. 788 F.2d at 1012. The Third Circuit stated:

Section 157(b)(2)(B) excepts from the definition of 'core proceedings' personal tort claims against the debtor. The bankruptcy court is without authority under the Act over 'the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution under Title 11' 28 U.S.C. § 157(b)(2)(B). (Italics added) It will be observed, however, that the statute denies authority to the bankruptcy court to 'estimate' contingent claims only if the purpose is to make a 'distribution' of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to 'estimate' the contingent 'personal injury' claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. (cites omitted) Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction and that such estimations are not foreclosed by Section 157(b)(5) of the Act. (footnote omitted)

This is not to say the personal claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But, even though the tort claimants may be entitled to their jury trials, the bankruptcy court *is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims.* The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities which have considered this question in connection with a complicated products liability situation such as this are all unanimous. *The esti-*

> *mations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims.*

788 F.2d at 1012 (emphasis added). Contrary to the proponents of the Debtor's motion to transfer and to hold a one causation trial for purposes of estimation, the *A.H. Robins* case states that the estimation process should occur first before any trials are held. The *A.H. Robins* court approved the district court's "tentative" order fixing the venue in the district court sitting in bankruptcy for all these claims. This Court finds the language in *A.H. Robins* does not foreclose this Court from ordering one or more causation trials to take place prior to the conclusion of the estimation process should the estimation process stall or if there is a need to test the accuracy of the estimation. Upon request of the Debtor. Claimants and/or the Bankruptcy Court this Court would entertain a subsequent motion to assist the estimation process by holding one or several trials. However, the estimation process must move forward first.

The Third Circuit Court further noted that having the estimation first before the trials would benefit all the claimants:

> . . . If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. (footnote omitted) . . .

In re A.H. Robins, 788 F.2d at 1013. In remanding the matter for further notice and hearing, the *A.H. Robins* court was

mindful of the importance in balancing the advantages and disadvantages of having the trial in one district court or leaving the case at the state level. 788 F.2d at 1014, 1016. This Court is mindful that one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending. Coordination is therefore assured.

The Court agrees with the finding in *A.H. Robins* that the Bankruptcy Court should first estimate the unliquidated, contingent tort injury claims before a trial is held. As the Claimants argue, the estimation process can be accomplished in a short period of time. The Debtor has the information needed to value the unliquidated tort injury claims.

The Court notes that both the Debtor and the Claimants agreed during oral arguments the one causation trial will not resolve all the issues between the Debtor and the Claimants. Issues including individual liability, rupture of implants, mechanical causation, and disfigurement would not be addressed if only one causation trial were held. Further trials will be needed to resolve these issues.

Pending trial or other resolution, any removed claims against the Debtor should be subject to the MDL panel and such claims will be transferred to the MDL Judge for pretrial purposes which should not be inconsistent with the automatic stay of the Bankruptcy Court currently in effect as to the claims against the Debtor Dow Corning. All parties agree that the bankruptcy stay applies to all claims involving the Debtor. Therefore, there is no need to physically transfer the records of all the cases involving the Debtor to this District at this time. The Court also notes that many of the cases involving the Debtor are currently before the MDL judge. There is no need to waste resources of the court system, the Debtor and the Claimants with the physical transfer of all the case records involving the Debtor either to this District or the MDL transferee court. The Court will rely on the judgment of the trans-

feree judge to request from the transferor district clerks or the parties whatever case files and docket sheets he needs. The Court is also aware that alternative resolutions of many of the claims will occur prior to the liquidation/trial phase of the Debtor's bankruptcy which would obviate the need for physical transfer of the case records to this District for trial. Section 157(b)(5) does not mandate that all tort actions must be tried in district court, but only those which are not otherwise settled. *In re A.H. Robins*, 788 F.2d at 1013, n. 17. The Court further notes that unilateral dismissal of claims against a debtor under Fed.R.Civ.P. 41, or its equivalent by agreement and with judicial approval, assists rather than interferes with goals of Chapter 11. Such actions do not violate the automatic stay. *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 852 F.Supp. 226, 228 (S.D.N.Y. 1994). The MDL judge may enter such orders consistent with this Court's opinion and order.

The Court's decision that the estimation process should proceed without physically transferring the case files for one causation trial does not divest this Court of original and exclusive jurisdiction over the bankruptcy action pursuant to 28 U.S.C. § 1334(a). Should the Bankruptcy Court need more information for estimation purposes or reach the liquidation phase, the Court may again consider the issue of one or more causation trials should any party to the bankruptcy action request the Court to do so.

D. *Whether the claims against Dow Chemical Co. and Corning, Inc. should also be transferred to this Court and whether said claims are "related to" the Debtor's bankruptcy proceedings.*

The Court has jurisdiction under 28 U.S.C. § 1334(b) to "all civil proceedings . . . related to cases under title 11." "Related to" jurisdiction includes actions involving non-debtors that could "conceivably" have an effect on the Debtor's bankruptcy case. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984); *Robinson v. Michigan Consol. Gas*

Co. Inc., 918 F.2d 579, 583-584 (6th Cir. 1990). In a recent Supreme Court case, the Court addressed the "related to" jurisdiction of the Court:

> Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex Corp. v. Edwards, 115 S.Ct. 1493, 1498-1499 (1995).

As stated above, Dow Chemical and Corning, Inc. are each 50% shareholders ("Shareholders") of Dow Corning. According to Dow Chemical and Corning, Inc., they meet the "related to" test under § 1334(b). First, any judgment entered either for, or against either or both of the Shareholders will directly impact the Debtor's assets in bankruptcy. Any judgments against the Shareholders would generate claims for contribution against the Debtor which would need to be resolved as part of the bankruptcy plan process. Any judgment for the Shareholders would likely extinguish that plaintiff's claim against Dow Corning based on collateral estoppel. Second, the Shareholders' litigation will inevitably affect Dow Corning's rights under the insurance coverage it shares with either Shareholder, thereby diminishing the insurance available to the Debtor to fund a plan of reorganization and

delaying the time that proceeds of insurance settlements will be available. Third, because it is the Debtor's product that will be on trial in any Shareholder litigation, the Debtor may claim it would need to participate actively in the defense and the costs of such participation would divert attention from the Debtor's reorganization both in terms of money and time.

In response, the Claimants assert that the Shareholders are large and healthy corporations that have no right to enjoy the protections afforded by bankruptcy. A bankruptcy filing does not bar an action against the principal of a debtor-corporation. *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991). The Claimants further assert that the contribution claim by the Shareholders against the Debtor is theoretical at this time. In *Pacor*, *supra*, the Court held that the actions against the non-debtor would have no effect on the debtor's bankruptcy estate and therefore is not "related to" bankruptcy within the meaning of section 1471(b).[1] 743 F.2d at 995. The Third Circuit stated:

> . . . At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. (cites omitted) Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995. The Third Circuit went on to state that without a judgment against the non-debtor, there could never be a third

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[1] Section 1471 is now 28 U.S.C. § 1334.

party indemnification claim against Manville. *Id.* The Claimants assert that a separate proceeding under 11 U.S.C. § 502 must be brought before the Bankruptcy Court if a judgment is rendered against the Shareholders.

Claimants state that if the real concern of the Shareholders is the fact that a certain insurance policy or policies are co-owned by the Debtor and Dow Chemical, then that issue should be brought to the Bankruptcy Court pursuant to *In the Matter of Vitek, Inc.*, 51 F.3d 530 (5th Cir. 1995). The Fifth Circuit in that case reversed the district court and affirmed the bankruptcy court's approval of certain settlements, finding that the bankruptcy court had jurisdiction over liability insurance policies where the debtor was a co-insured with other parties. The Fifth Circuit noted that a bankruptcy estate includes a debtor's interest in liability insurance under 11 U.S.C. § 541(a)(1). *In the Matter of Vitek*, 51 F.3d at 533.

In the instant case, as in Pacor, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502. Joint tortfeasors are not indispensable parties in the federal forum. *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1198 (6th Cir. 1983). The Bankruptcy forum provides for a mechanism to resolve the Debtor's liability for indemnification should a judgment be rendered against the Shareholders.

The insurance issue raised by the Shareholders is under the jurisdiction of the Bankruptcy Court pursuant to 11 U.S.C. § 541. Section 541 gives the Bankruptcy Court broad discretion over the Debtor's interest in a liability insurance policy where the Debtor is a co-insured with a non-debtor third-party. *In the Matter of Vitek*, 51 F.3d at 533. Given that there has been no judgment entered against the Shareholders, the Shareholders have no claim pending against the insurance policy at this time and there are currently no competing inter-

ests involved for the insurance funds as between the Debtor and its coinsured.

As to the Shareholders' argument that judicial economy would best be served if the cases against them were joined with the cases against the Debtor, the *Pacor* court has stated that "judicial economy itself does not justify federal jurisdiction." *Pacor*, 743 F.2d at 994. This Court finds that judicial economy alone does not justify this Court exercising jurisdiction over the non-bankruptcy actions involving the Shareholders. The claims involving the Shareholders are not related to the bankruptcy action before the Court. The Court has no jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b).

E. *Motions and Proposed Orders Dismissing the Debtor and/or Remanding claims involving Dow Chemical and Corning, Inc.*

Various Claimants in their responses to the Debtor's motion to transfer and during oral arguments indicate that there are motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving Dow Chemical and Corning, Inc. currently pending either in the district court to which Dow Chemical and Corning, Inc. removed the cases or before the MDL judge.[2] Given this Court's ruling that it has no Jurisdiction over the claims involving the Shareholders, those motions and/or orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court in which those claims are currently pending or by Judge Pointer if the case has been transferred to the MDL court. Furthermore, claims against the Shareholders currently pending before a state court should no longer be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b).

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[2] The Court notes that its July 5, 1995 Order Provisionally Transferring Certain Breast Implant Cases to this Court pending a hearing specifically stayed actions involving the Debtor, Dow Corning and did not stay any proceedings as to Dow Chemical or Corning.

III. *CONCLUSION*:

This Court finds it has jurisdiction over all the opt-out breast implant claims against the Debtor Dow Corning pursuant to 28 U.S.C. § 1334(a) and this Court does not exercise its discretion to abstain from this jurisdiction. The Court also has the sole authority to fix the trial venue for any personal injury trials in this matter pursuant to 28 U.S.C. § 157(b)(5). For the purpose of determining the trial venue of the breast implant cases or furthering the estimation process, the Court transfers the claims against the Debtor Dow Corning to this Court. However, the Court will not rule on the trial venue issue, at this time but will make that determination following the close of the estimation process. Pursuant to 28 U.S.C. § 157(b)(5), trial will either be here, in the district court in which the bankruptcy case is pending, or the district court in the district in which the claim arose as this Court may designate. The Court finds no physical transfer of case files or case records to the Eastern District of Michigan is necessary at this time and no such transfer should be made until further order of this Court.

Any removed claims against the Debtor will be subject to the MDL panel and such claims will be transferred to the MDL Judge for pretrial purposes only (the setting of the trial venue having been reserved by this Court) and such pre-trial proceedings shall not be inconsistent with the automatic stay of the Bankruptcy Court which is currently in effect as to the claims against the Debtor Dow Corning. Although Panel Rule 19(a) requires clerks of the transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action, because of the voluminous files, the transferee MDL judge will determine whatever case files and docket sheets he needs from the transferor district clerks.

The Bankruptcy Court should proceed with its estimation process regarding these claims. However, a causation trial at this stage of the proceedings is not necessary. The Court does not foreclose its discretion or authority to hold such a trial or

trials at any point in the estimation process for the purpose of furthering or assisting the process should it be called upon to do so. Such motions should be addressed to this Court.

The Court finds it has no jurisdiction over the claims against the non-debtors Dow Chemical and Corning, Inc. and denies the Debtor's motion to transfer these claims. Claims against the non-debtors shall be remanded to state courts if the only basis for removal is the Court's "related to" jurisdiction. The Debtor Dow Corning shall be dismissed or may be severed from the claims against it and other non-debtor defendants in accordance with this opinion and claimants shall be allowed to proceed as scheduled against the non-debtors. Claims against the Debtor continue to be stayed pursuant to the automatic stay of the Bankruptcy Court.

Accordingly,

IT IS ORDERED that the Court has jurisdiction over all the opt-out breast implant claims against the Debtor Dow Corning pursuant to 28 U.S.C. § 1334(a) and is not exercising its discretion to abstain from this jurisdiction;

IT IS FURTHER ORDERED that the Court has the sole authority to fix the trial venue for any personal injury trials in this matter pursuant to 28 U.S.C. § 157(b)(5) and the Court GRANTS the Debtor's motion to transfer the opt-out breast implant cases for the purposes of setting the trial venue of the claims against the Debtor or furthering the estimation process if necessary. The Court will determine following the close of the estimation process, whether the trial venue of the personal injury tort claims, will be either in this Court, the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose pursuant to 28 U.S.C. § 157(b)(5);

IT IS FURTHER ORDERED that any removed claims against the Debtor will be subject to the MDL panel and such claims will be transferred to the MDL Judge for pre-trial purposes only (the setting of the trial venue having been reserved by

this Court) and such pre-trial proceedings shall not be inconsistent with the automatic stay of the Bankruptcy Court which is currently in effect as to the claims against the Debtor Dow Corning. Although Panel Rule 19(a) requires clerks of the transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action, because of the voluminous files, the transferee MDL judge will determine whatever case files and docket sheets he needs from the transferor district clerks;

IT IS FURTHER ORDERED that no physical transfer of case files or case records to the Eastern District of Michigan should take place at this time nor until further order of this Court;

IT IS FURTHER ORDERED that the motion of the Debtor Dow Corning to transfer the breast implant cases for the purpose of holding one causation trial prior to the estimation process is DENIED without prejudice at this time, the Court reserving its authority to hold such a trial or trials to further the efforts of the estimation process;

IT IS FURTHER ORDERED that the Bankruptcy Court should proceed with an estimation process required by 11 U.S.C. § 502(c);

IT IS FURTHER ORDERED that the Debtor's motion to transfer the breast implant claims against the non-debtors Dow Chemical and Corning, Inc. to the Eastern District of Michigan is hereby DENIED;

IT IS FURTHER ORDERED that motions and proposed orders seeking to dismiss or sever the Debtor from claims against other breast implant defendants pending in either state courts or in federal district courts should be GRANTED and an order should be entered by those respective courts in accordance with this opinion and order;

IT IS FURTHER ORDERED that the claims against the non-debtors Dow Chemical and Corning, Inc. which have been

removed to federal district courts shall be REMANDED to the respective state courts if the only basis for removal is 28 U.S.C. §§ 1334(b) or 1367(a);

IT IS FURTHER ORDERED that the claims against the Debtor Dow Corning continue to be stayed pursuant to the automatic stay of the Bankruptcy Court until further order of the Bankruptcy Court;

IT IS FURTHER ORDERED that the time for removal of the opt-out breast implant claims pursuant to Bankruptcy Rule 9027(a)(2)(A) against the Debtor Dow Corning be enlarged to 30 days from the date of this Order or the Debtor Dow Corning may remove the claims 30 days after entry of an order terminating the stay pursuant to Bankruptcy Rule 9027(a)(2)(B);

IT IS FURTHER ORDERED that the MDL Judge may enter orders to remand, to dismiss and to sever any claims against non-debtors, including the Shareholders, in accordance with this Opinion and Order.

DATED: Sep 12 1995

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

Sept. 12, 1995.

In Re: DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER ON THE NON-DEBTORS' MOTIONS TO TRANSFER

HON. DENISE PAGE HOOD, *District Judge.*

I. *INTRODUCTION/FACTS:*

This matter is before the Court on the non-debtors Medical Engineering Corporation/Bristol-Myers Squibb ("MEC Defendants"), Minnesota Mining and Manufacturing Company ("3M") and Baxter Healthcare Corp. and Baxter International, Inc.'s ("Baxter Defendants") motions to transfer breast implant cases to the United States District Court, Eastern District of Michigan. Responses were filed and a hearing was held on the matter.

On May 15, 1995, the Debtor, Dow Corning Corporation, sought a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code with the Bankruptcy Court of the United States District Court, Eastern District of Michigan, Northern Division in Bay City, before the Honorable Arthur J. Spector. On June 12, 1995, the Debtor filed a motion to transfer certain breast implant cases before the Bankruptcy

Court. Judge Spector entered a Determination and Report and Recommendation Regarding the Debtor's Motion to Transfer on June 13, 1995 indicating that the District Court had jurisdiction over this motion. The non-debtors, MEC Defendants, 3M, and Baxter Defendants also filed similar motions to transfer before the Bankruptcy Court. On July 5, 1995, this Court entered an order provisionally transferring the opt-out breast implant cases involving the Debtor only to the Eastern District of Michigan pending a hearing scheduled for the motion on July 31, 1995. The Court also scheduled the non-debtors' motions to transfer on the same date.

Plaintiffs have filed various causes of actions all over the United States against the non-debtors and movants, MEC Defendants, 3M and Baxter Defendants, alleging, *inter alia*, that the silicone breast implants manufactured by these companies, caused certain diseases and injuries. The non-debtor Defendants have also been sued, in some cases, as joint tortfeasors with the Debtor, naming the Debtor as the supplier of certain raw materials. They seek to have the actions against them transferred to this District along with the actions involving the Debtor, essentially so that the Court can hold one or more consolidated trials on the issue of causation only.

II. *ANALYSIS*:

A. *Whether the claims involving the non-debtors are "related to" the Debtor's bankruptcy proceedings under 28 U.S.C. § 1334(b).*

The district court has jurisdiction under 28 U.S.C. § 1334(b) to "all civil proceedings . . . related to cases under title 11." "Related to" jurisdiction includes actions involving non-debtors that could "conceivably" have an affect on the Debtor's bankruptcy case. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984); *Robinson v. Michigan Consol. Gas Co. Inc.*, 918 F.2d 579, 583-584 (6th Cir. 1990). In a recent Supreme Court case, the Court addressed the "related to" jurisdiction of the Court:

> Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

In re Celotex Corp., 115 S.Ct. 1493, 1498-1499 (1995).

In *Pacor, supra*, the Court held that the actions against the non-debtor would have no effect on the debtor's bankruptcy estate and therefore are not "related to" bankruptcy within the meaning of section 1471(b).[1] 743 F.2d at 995. The Third Circuit stated:

> . . . At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. (cites omitted) Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or

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[1] Section 1471 is now 28 U.S.C. § 1334.

> adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995. The Third Circuit went on to state that without a judgment against the non-debtor, there could never be a third party indemnification claim against Manville. *Id.* The Sixth Circuit also noted that any judgment received could not itself result in even a contingent claim against the debtor since an entirely separate proceeding to obtain indemnification must first be made. There is no automatic/contractual basis for indemnification between the non-debtor and the debtor. *Id.*

In the instant case, as in *Pacor*, there would be no contingent claim by the non-debtors against the Debtor for indemnification until such time as a judgment is rendered. Even then, the non-debtors would have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor before the Bankruptcy Court. There has been no allegation that there is a contractual or automatic basis for indemnification between the non-debtors and the Debtor. Nor has there been any assertion that the non-debtors have filed any crossclaims against the Debtor. Even if crossclaims were filed by the non-debtors against the Debtor, those claims could be severed and the matter could proceed as to the non-debtors.

The non-debtors have asserted that judicial economy should be a concern for the Court. The *Pacor* court addressing judicial economy wrote:

> On the other hand, the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section 1471(b). Judicial economy itself does not justify federal jurisdiction. (cites omitted) '[J]urisdiction over non-bankruptcy controversies with third parties who are oth-

> erwise strangers to the civil proceeding and to the parent bankruptcy does not exist.' (cites omitted).

Pacor, 743 F.2d at 994. This Court finds that judicial economy would not be attained by having one or more causation trial on the issue of disease involving the non-debtors because there appear to be other issues involved that need to be tried subsequent to the causation trial, i.e., mechanical causation and punitive damages. This Court further finds that judicial economy alone does not justify this Court obtaining jurisdiction over the non-bankruptcy actions involving the non-debtors. The claims against the non-debtors are not related to the bankruptcy action before the Court and the Court has no jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b).

B. *Whether the Court possesses supplemental jurisdiction under 28 U.S.C. § 1367(a).*

The non-debtors cite *In re Cuyahoga Equip. Corp.*, 980 F.2d 110 (2d Cir.1992) to support their argument that this Court possesses supplemental jurisdiction over the actions against the non-debtors pursuant to 28 U.S.C. § 1367(a). In that case, the court stated:

> The district court's authority to approve the settlement, with respect to the environmental causes of action, could properly be founded on its supplemental jurisdiction. Given an independent jurisdiction source like that provided by § 1334(b), federal courts possess supplemental jurisdiction over related claims. See 28 U.S.C.A. § 1367(a) (West Supp. 1992) ("[T]he district courts shall have supplemental jurisdiction over all other claims that are *so related to* claims in [an] action within [a court's] original jurisdiction that they form part of the same case.") In the case at hand, the environmental causes form part of the same case with the bankruptcy claims because all of them, resolved in the settlement agreement, concern the government's attempts to remedy haz-

> ardous substance releases at the Publicker site and they remain intertwined in the competing parties' efforts to secure a share of the proceeds of the option sale. Even without an independent source of jurisdiction over the environmental actions, § 1367(a) therefore vested the Southern District with jurisdiction over them as related claims forming part of the same case pending before it. (cites omitted) (emphasis added).

Id. at 115. The Court notes that this appears to be the only circuit case which addresses supplemental jurisdiction under Section 1367 involving a bankruptcy. *In the Matter of Walker*, 51 F.2d 562, 572 (5th Cir. 1995). The Fifth Circuit noted that the Second Circuit "did not rest on § 1367 alone, noting that '[t]he district did not need to rely solely on its supplemental jurisdiction to approve the settlement, because additional authority arises from CERCLA's jurisdictional grant. . . .' " (cites omitted). 51 F.2d at 572, n. 8. Section 1367 also uses the "related to" language in order for a court to exercise jurisdiction over an action.

Given the facts in the instant case, this Court finds that it does not have supplemental jurisdiction over the claims against the non-debtors. The breast implant actions against the non-debtors are not "so related" to the bankruptcy action that "they form part of the same case." In the *In re Cuyahoga* case, the Second Circuit found that the environmental causes formed part of the bankruptcy claims because those claims remained "intertwined in the competing parties' efforts to secure a share of the proceeds of the option sale." 980 F.2d at 115. Here, the non-debtors have not shown that the claims against them are so "intertwined" with the Debtor's interests in the bankruptcy action. The Court finds that it has no supplemental jurisdiction over the claims involving the non-debtors that do not involve the Debtor.

Since this Court has ruled that it does not have jurisdiction over the claims against the non-debtors, the Court will not address the abstention issue in detail. The Court incorporates by reference its analysis of the abstention issue in its

Memorandum Opinion and Order on the Debtor's Motion to Transfer.

C. *Motions and Proposed Orders Dismissing the Debtor and/or Remanding Claims involving the Non-Debtors Currently Pending.*

Various Claimants in their responses to the non-debtors' motions to transfer and during oral arguments indicate that there are motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving the non-debtors currently pending either in the district court to which the non-debtors removed the matter or before the Multi District Litigation Panel ("MDL") judge, the Honorable Sam C. Pointer in the Northern District of Alabama.[2] Given this Court's ruling that it has no jurisdiction over the non-debtors' claims, those motions and/or orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court where those causes of actions are currently pending or by Judge Pointer if that case has been transferred to the MDL court. Claims against the non-debtors currently pending before a state court must not be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b) or § 1367(a).

Accordingly,

IT IS ORDERED that the non-debtors Medical Engineering Corporation/Bristol-Myers Squibb, Minnesota Mining and Manufacturing Company and Baxter Healthcare Corp. and Baxter International, Inc.'s motions to transfer breast implant cases to the Eastern District of Michigan are hereby DENIED;

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[2] The Court notes that its July 5, 1995 Order Provisionally Transferring Certain Breast Implant Cases to this Court pending a hearing specifically stayed actions involving the Debtor, Dow Corning and did not stay any proceedings as to the non-debtors.

IT IS FURTHER ORDERED that motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving the non-debtors back to state court currently pending either in the district court to which the non-debtors removed the matter or before the MDL judge, should be granted by that Court in accordance with this Court's opinion; and

IT IS FURTHER ORDERED that the non-debtors are ENJOINED from removing any claims against all the non-debtors currently pending before a state court to the United States District Court if the only basis for removal is under 28 U.S.C. § 1334(b) or § 1367(a).

Dated: Sep 12 1995

/s/ DENISE PAGE HOOD
Denise Page Hood
United States District Judge

Appendix D

UNITED STATES COURT OF APPEALS,
FOR THE SIXTH CIRCUIT.

Nos. 95-2034/2082/2084/2106/2107
Filed June 3, 1996
LEONARD GREEN, Clerk

IN RE: DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, REP. OF CHARLOTTE MAHUM AND CHERYL KAHN, *ET AL.*,

Plaintiffs,

OFFICIAL COMMITTEE OF TORT CLAIMANTS; *ET AL.*,

Plaintiffs-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTHCARE PROVIDERS OF CONNECTICUT, *ET AL.*,

Defendants,

DOW CORNING CORPORATION, *ET AL.*,

Defendants-Appellants.

Before:

MARTIN and BATCHELDER, *Circuit Judges*
WISEMAN,* *District Judge.*

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* Hon. Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

This panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

This panel is, however, issuing an amended opinion in which we adhere to the April 9, 1996 decision in this case, but seek to clarify the scope of the ruling and the impact it is intended to have. The opinion is therefore amended and reissued as follows. Mandate to issue immediately.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk